Supreme Court, U.S.
FILED
JAN 20 2004

No. 031043

In The Supreme Court of the United States

MICHIGAN PORK PRODUCERS ASSOCIATION, INC., et al.,

Petitioners,

v.

CAMPAIGN FOR FAMILY FARMS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

EDWARD M. MANSFIELD
Counsel of Record
BELIN LAMSON MCCORMICK ZUMBACH FLYNN, A PROFESSIONAL CORPORATION
666 Walnut Street,
2000 Financial Center
Des Moines, IA 50309-3989
Telephone: (515) 243-7100

ROBERT C. TIMMONS
BOYDEN TIMMONS DILLEY & HANEY
3000 Old Town Riverfront Bldg.
85 Campau Ave. NW
Grand Rapids, MI 49503
Telephone: (616) 235-2300

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

May Congress deliver a message to Americans to eat more pork by enacting a so-called "Pork Tax" on sales of hogs, when the advertising is created by others but specifically approved word-by-word in advance by the U.S. Department of Agriculture?

The United States Court of Appeals for the Sixth Circuit held that such a "Pork Tax" violated the First Amendment and invalidated an entire $50 million federal agricultural program that had been in effect since 1985. Petitioners respectfully urge this Court to grant the petition for writ of certiorari and reverse the Sixth Circuit, in order to insure that the federal government may continue to speak, in this and other areas, without being hamstrung by improvident extensions of First Amendment doctrine.

PARTIES TO THE PROCEEDING

These Petitioners are six State Pork Producer Associations and three hog farmers who had asked the district court and the court of appeals to uphold the constitutionality of the Pork Promotion, Research, and Consumer Information Act ("Pork Act"). The petitioning state associations – namely, Michigan Pork Producers Association, Inc., California Pork Producers Association, Kentucky Pork Producers Association, Indiana Pork Producers Association, New York Pork Producers Cooperative, Inc., and Ohio Pork Producers Council – are all nonprofit state pork producer associations that receive Pork Act assessments to carry out programs specifically approved by USDA. Each association is governed through an open, democratic process and has been "recognized by the chief officer of such State as representing such State's producers." 7 C.F.R. § 1230.25 (*see* Appendix at 70a). The other Petitioners – Pete Blauwiekel, Bob Bloomer, and High Lean Pork, Inc. – are Michigan hog farmers who support the Pork Act because of the benefits it provides.

The National Pork Producers Council, a nonprofit organization that receives certain Pork Act funds from the National Pork Board, also participated in the proceedings below and urged the courts to uphold the constitutionality of the Pork Act.

The Respondents in this case are an unincorporated association (Campaign for Family Farms) and four individuals (James Dale Joens, Richard Smith, Rhonda Perry, and Larry Ginter) who either raise hogs or have raised hogs in the past. The Respondents asked the lower courts to declare the Pork Act unconstitutional.

PARTIES TO THE PROCEEDING – Continued

Both the Secretary of Agriculture and the Administrator of the Agricultural Marketing Service (an agency of USDA) also appeared below and sought a declaration that the Pork Act was constitutional. They have requested an extension of the government's deadline to file a petition for writ of certiorari.

No parent or publicly held corporation owns 10 percent or more of the stock of any of the Petitioners.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE GRANTED	13
I. Introduction	13
II. The Sixth Circuit's Opinion Conflicts with Prior Decisions of this Court and at Least One Other Circuit	15
III. The Sixth Circuit's Three-Part Test Creates a Dangerous Precedent with Far-Reaching Implications	21
IV. The Government Speech Doctrine Has Created Both Confusion and Conflict in Lower Courts and There is a Pressing Need to Address It Now	26
CONCLUSION	29

APPENDICES

Page

Appendix A – Opinion of the United States Court of Appeals for the Sixth Circuit, Filed October 22, 2003 ..... 1a

Appendix B – Opinion of the United States District Court for the Western District of Michigan, Filed October 25, 2002 ..... 15a

Appendix C – Excerpts from the Pork Promotion, Research, and Consumer Information Act of 1985 ("the Pork Act") 56a

Appendix D – Excerpts from 7 CFR Part 1230 ..... 70a

TABLE OF AUTHORITIES

Page

CASES:

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 16, 17

Board of Regents of University of Wisconsin v. Southworth, 529 U.S. 217 (2000) ..... *passim*

Charter v. U.S. Department of Agriculture, 230 F.Supp.2d 1121 (D. Mont. 2002) 14, 27

Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000) 14, 19, 20

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) 26

Keller v. State Bar of California, 496 U.S. 1 (1990) .. 15, 16, 17

Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) 14, 16, 17

Livestock Marketing Assn. v. U.S. Department of Agriculture, 335 F.3d 711 (8th Cir. 2003) 14, 27

Michigan Pork Producers Assn., Inc. v. Campaign for Family Farms, 174 F.Supp.2d 637 (W.D. Mich. 2001) 6

New York Times Co. v. United States, 403 U.S. 713 (1971) 19

Pelts & Skins, L.L.C. v. Jenkins, 259 F.Supp.2d 482 (M.D. La. 2003) 27, 28

R.J. Reynolds Tobacco Co. v. Bonta, 272 F.Supp.2d 1085 (E.D. Cal. 2003) 25

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995) ..... *passim*

Rust v. Sullivan, 500 U.S. 173 (1991) 17, 18, 20, 22

TABLE OF AUTHORITIES – Continued

Page

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 17, 20

Sons of Confederate Veterans, Inc. v. Commission of Virginia Dept. of Motor Vehicles, 305 F.3d 241 (4th Cir. 2002) (on denial of rehearing en banc) 14

Summit Medical Center of Alabama, Inc. v. Riley, 284 F.Supp.2d 1350 (M.D. Ala. 2003) 28

United States v. United Foods, Inc., 503 U.S. 405 (2001) 14, 27, 28

Wells v. City and County of Denver, 257 F.3d 1132 (10th Cir. 2001) 14

Wooley v. Maynard, 430 U.S. 705 (1977) 24

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, First Amendment ..... *passim*

STATUTES:

7 U.S.C. § 4801(b)(1) 2

7 U.S.C. § 4808(b)(2)-(3) 4

7 U.S.C. § 4809 3

7 U.S.C. § 4809(d) 7

7 U.S.C. § 4809(e) 17

7 U.S.C. § 4812(a) 4, 5, 19

7 U.S.C. § 4812(b) 19

7 U.S.C. § 4814(a) 24

21 U.S.C. § 355 25

TABLE OF AUTHORITIES – Continued

Page

21 U.S.C. § 355(n) 25

21 U.S.C. § 379h 25

28 U.S.C. § 1254 1

28 U.S.C. § 1331 1

REGULATIONS:

7 C.F.R. § 1230.25 ii

7 C.F.R. § 1230.55(b) 4

7 C.F.R. § 1230.74(a) 17

7 C.F.R. § 1230.85 8

7 C.F.R. § 1230.88 8

7 C.F.R. § 1230.90 24

7 C.F.R. § 1230.112 3

OTHER AUTHORITIES:

H.R. Rep. No. 99-271, House Committee on Agriculture, *reprinted in* U.S. Code Cong. & Admin. News, 99th Cong., 1st Sess. (1985) 2

S. Rep. No. 99-145, Senate Committee on Agriculture, Nutrition and Forestry, *reprinted in* U.S. Code Cong. & Admin. News, 99th Cong., 1st Sess. (1985) 3

Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377 (2001) 18

OPINIONS BELOW

The opinion of the Sixth Circuit is published at 348 F.3d 157 and reproduced in the Appendix at 1a-14a. The opinion of the district court, granting summary judgment to Respondents, is published at 229 F.Supp.2d 772 and reproduced in the Appendix at 15a-55a.

STATEMENT OF JURISDICTION

The judgment to be reviewed was entered on October 22, 2003. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254. The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech. . . .

Because of their length, the relevant provisions of the Pork Act are set forth in the Appendix at 56a-69a.

STATEMENT OF THE CASE

1. In 1985, Congress enacted the Pork Act to "authorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research, and consumer information designed to –

> (A) strengthen the position of the pork industry in the marketplace; and
>
> (B) maintain, develop, and expand markets for pork and pork products."

7 U.S.C. § 4801(b)(1) (57a).

One of Congress's main goals was to educate consumers about the benefits of eating pork. The official House Report states as follows:

> Because today's pork products are leaner than before, American consumers need to know that pork and pork products should play a significant role in their diets, and pork is an excellent food value from an economic and health standpoint. That is the role that pork promotion has to play – to inform the consuming public that pork not only tastes good, but is a positive nutritional component in a healthy, balanced diet. Promotion, research and consumer information will assist to enhance the acceptability of pork products while minimizing their cost and thus the pork sector of agriculture viable vis-à-vis its competitors.

H.Rep. No. 99-271, House Committee on Agriculture, *reprinted in* U.S. Code Cong. & Admin. News, 99th Cong., 1st Sess., p. 1294 (1985).

The official Senate Report likewise explained:

> The Committee believes that a national pork promotion program would help the pork industry compete with other industries and reverse the declining consumption trend that has persisted for many years.

S. Rep. No. 99-145, Senate Committee on Agriculture, Nutrition and Forestry, *reprinted in* U.S. Code Cong. & Admin. News, 99th Cong., 1st Sess., p. 1995 (1985).

The assessment established by the Pork Act (currently $.40 per $100) is based on the value of each porcine animal sold or slaughtered for sale. 7 U.S.C. § 4809; 7 C.F.R. § 1230.112 (61a-62a, 73a). It is not assessed on pork producers individually, but on the sale of hogs or the slaughtering of hogs for sale. *Id.* Each of the individual Respondents has characterized the assessment as a "Pork Tax," correctly recognizing that it functions like a sales tax. The more hogs you sell (or the more hogs you slaughter for sale if you are a vertically integrated producer), the more tax you pay. The Pork Tax is broad-based: it is paid by tens of thousands of businesses nationally on the sales of millions of hogs every year.

2. The funds collected by the "Pork Tax" (or "Pork Checkoff," as it is commonly called) go to the National Pork Board, a special entity created by the Pork Act. Every member of the 15-member Pork Board is appointed by the Secretary of Agriculture. Although potential nominees for the Pork Board are chosen by the National Pork Producers Delegate Body (whose members are themselves appointed by the Secretary), the Secretary makes the final decisions on appointments. The Secretary has declined to appoint individuals who had been recommended in the nomination

process. Also, the Secretary has the authority to remove any Pork Board member. 7 C.F.R. § 1230.55(b) (70a-71a). Although Pork Board members serve without compensation, their expenses are reimbursed.

The Internal Revenue Service of the U.S. Department of the Treasury has concluded, in an official opinion letter, that the Pork Board "is the federal government itself carrying on a governmental function through the [Agriculture] Department."

Pork Act assessments are used to fund Pork Board promotion, research, and consumer information projects in accordance with the Pork Act, to fund State Pork Producer Association promotion, research, and consumer information projects in accordance with the Pork Act, and to pay USDA's expenses of administering the Pork Act. Some dollars actually are used to pay the salaries of USDA employees in Washington. 7 U.S.C. § 4809(c) (63a-66a).

In addition to her authority to hire and fire the members of the Pork Board, the Secretary of Agriculture exercises the following controls:

- The Secretary must approve every plan or project funded by the Pork Act. No plan, project, or budget may become effective without the Secretary's approval. 7 U.S.C. § 4808(b)(2)-(3) (59a-60a).

- The Secretary may terminate or suspend the collection of assessments at any time if she determines that the Pork Checkoff is not tending to effectuate the declared policy of the Act. 7 U.S.C. § 4812(a) (67a-68a).

- A full-time employee of USDA attends all meetings of the Pork Board membership.

One USDA staffer devotes full time to supervising the activities of the Pork Board and the State Pork Producer Associations under the Pork Act; other USDA employees devote portions of their time to this work.

- USDA approved the hiring of the full-time CEO of the Pork Board.

- USDA is involved in formulating the Pork Board's annual budget from the very beginning. USDA employees attend and participate in all the Pork Board Budget Committee meetings, which is where the initial proposed budget line items are developed. USDA staff identify areas of need for the Pork Board that they feel should be covered by the budget. USDA staff then review the proposed budget line items again when they are submitted to USDA. USDA may request modifications in programs or delete proposed programs.

Similarly, State Pork Producer Associations are required to submit their plans and budgets in advance to USDA for approval. Also, they are required to conduct elections in compliance with USDA requirements.

In 2000, after invoking the aforementioned authority under 7 U.S.C. § 4812(a), U.S. Secretary of Agriculture Dan Glickman conducted a discretionary one producer-one vote "fairness" referendum on whether the Pork Checkoff should continue. After a reported 53-47 percent majority voted against the checkoff, Secretary Glickman began terminating the program in January 2001, even though he publicly stated it was an "effective program." However, upon taking office later that month, Secretary Ann Veneman decided to increase certain controls over the program, rather than terminate it. Her decision not to terminate the

Pork Checkoff program was upheld by the district court and not appealed by the Respondents. *See Michigan Pork Producers Assn., Inc. v. Campaign for Family Farms*, 174 F.Supp.2d 637 (W.D. Mich. 2001).[1]

3. Approximately 20 percent of the funds generated by the Pork Act are spent on generic advertising of pork.[2] USDA exercises prior censorship over every word of every Pork Act advertisement. Whether the proposed ad is being run by the Pork Board or by a State Pork Producer Association, its complete text must be submitted in advance to USDA. USDA modifies or disapproves the ad where it disagrees with any aspect of the message. As explained by a USDA witness, "Our purpose is to make sure they [the ads] are consistent with the act and the order, that they are not disparaging other commodities, that they are factual and that they carry out the policies and are consistent with the objectives of the department." No ad may be run by the Pork Board or a State Pork Producer Association until it has been approved by USDA. USDA also receives confirmation copies of all ads after they have been run.

---

[1] In any event, the record demonstrates that the "fairness" referendum was far from fair. For example, two of the individual Respondents have admitted that their *spouses* cast ballots in the referendum (presumably against the Pork Checkoff), even though not legally authorized to do so.

[2] Seemingly disagreeing with this point, the Sixth Circuit observed that 51 percent of Pork Act expenditures relate to "demand enhancement." *See* 11a. However, as demonstrated by the table in the Sixth Circuit's opinion, demand enhancement includes much more than just advertising. For example, "merchandising" (*e.g.*, getting retail stores to carry more pork) and "foreign market development/world trade" fall within demand enhancement, even though they do not involve advertising. The Pork Board's budget is, of course, a public document and available for review by any interested party.

USDA rejects numerous ads. For example, one of the USDA officials responsible for administering the Pork Act[3] recently rejected two ads – one because it made a nutrition claim that he did not agree with, the other "because I quite frankly didn't like the way they were saying what they were saying. *It didn't seem like it was something that was appropriate for the government to be saying*" (emphasis added).

The record contains numerous examples of USDA's rewriting of Pork Checkoff-funded advertising. For example, during a particular two-week span, USDA (1) required deletion of the phrase "and a healthy alternative to those other meats" before approving an ad on April 27, 2001; (2) required the addition of the words "on average" before approving an ad on May 7, 2001; and (3) required the word "roasted" to be added before approving an ad on May 11, 2001. In another instance, the Oklahoma Pork Producers were required to change "enjoy the great taste and health benefits to eating Pork" to "enjoy the great taste of the many varieties of Pork."

Also, although nothing in the Pork Act prohibits the Pork Board or State Pork Producer Associations from touting the merits of pork vis-à-vis other meats, 7 U.S.C. § 4809(d) (prohibiting only the use of Pork Act funds to make "false or misleading" statements) (66a), USDA as a matter of policy rigorously roots out such comparisons and prevents them from being aired. For example, "Nothing

---

[3] The Pork Board runs about 145 separate ads per year, which means that USDA has to review about three proposed Pork Board ads every week. Many of the ads are repetitive of earlier ads; that is certainly true of the ads run by the State Pork Producer Associations.

satisfies a customer's desire for something different like the flavor of pork" had to be changed to "Pork's flavor satisfies a customer's desire for something different." USDA also recently prohibited the Pork Board's economist from commenting on the effect of Russia's decision to authorize the resumption of poultry imports from the U.S.

USDA employees do not pen the original texts of the ads. Rather, USDA engages in regular discussions with the Pork Board staff as ads are developed and then responds to drafts. This is, of course, a normal developmental process in advertising. As Petitioners pointed out below, the Army did not invent the slogans "Be All You Can Be" and "An Army of One"; each of these slogans was designed by a private ad agency.

All copyrights, trademarks, inventions, or publications developed through Pork Checkoff funds are "the property of the United States Government as represented by the Board." 7 C.F.R. § 1230.88 (73a). The highly successful slogan "Pork: The Other White Meat" is not government property. It was developed with private funding prior to the enactment of the Pork Act, and is licensed to the Pork Board on an ongoing and exclusive basis at a bargain rate of $1 per year. Other than this unique asset (unique because it was created before enactment of the Pork Act), all funds and property will revert to the USDA if the Pork Checkoff is finally terminated. 7 C.F.R. § 1230.85 (71a-72a).

4. Since its enactment by Congress in 1985, the Pork Act has been enormously successful. According to a recent independent, peer-reviewed economic study that was mandated by Congress and took three person-years to complete, the Pork Act delivers at least $4.79 in returns to

pork producers for each $1 in assessments. The demand enhancement activities (such as advertising) are particularly effective, and provide even higher positive returns of $15.26 to each $1 invested. Conservatively, the Pork Checkoff results in a net price increase of $1.17 per hog sold in the United States. These are across-the-board benefits to all pork producers, large and small. Petitioners doubt that many federal programs could pass such a rigorous cost-benefit test.

Because of Pork Checkoff-funded foreign market development initiatives in Asia and elsewhere, the United States has gone from being a net importer of pork (the second largest) to the second largest exporter of pork in the world. Pork is the fastest growing meat category in America's restaurants.

Also, this congressionally mandated study concluded that there is no effective substitute for a mandatory Pork Act assessment. A voluntary assessment would present a "free rider" problem; you could get the benefits without paying for them. Congress itself observed in 1985 that voluntary checkoffs had been inadequate. S. Rep. No. 99-145, Senate Committee on Agriculture, Nutrition and Forestry, *reprinted in* U.S. Code Cong. & Admin. News, 99th Cong., 1st Sess., p. 1995; H.R. Rep. No. 99-271, House Committee on Agriculture, *reprinted in* U.S. Code Cong. & Admin. News, 99th Cong., 1st Sess., p. 1295. Additionally, the congressionally mandated study found that generic advertising is much more effective at stimulating demand for pork than branded advertising. Thus, relying on branded advertising alone would not provide the same benefits.

Recognizing the importance of this study, Respondents tried below to rebut its conclusions. The attempted rebuttal turned into a reaffirmation. Respondents' expert testified that he was "inclined" to accept the study that produced the $4.79/$1.00 and $15.26 benefit/cost ratios with only an adjustment for the discount rate. (He wanted to use an implausible and unprecedented 15 percent *per annum* discount rate, which still resulted in a highly positive benefit/cost ratio.) Ultimately, Respondents' expert characterized the study as "pretty good." Also, he expressly declined to accept arguments advanced by Respondents' counsel that pork packers and retailers are "free riders" because, allegedly, they do not pay the Pork Checkoff while receiving benefits from it.

In short, the economic benefits of this $50 million per year congressional program are beyond dispute. Generic advertising of pork has worked extraordinarily well. And while farmer-beneficiaries of this program have to pay for it, they receive far more in returns than they are assessed in checkoff.

Opponents of the Pork Act largely rely on the *post hoc/propter hoc* fallacy – *i.e.*, if people are leaving pork production, then the Pork Checkoff must be at fault. Hog farming, like other sectors of American agriculture, is undergoing consolidation. As the congressionally mandated study pointed out, the Pork Act has ameliorated this trend, but cannot reverse it. Some producers cannot remain profitable even with the additional $1.17 net per hog provided by the Pork Act. But they blame the Pork Act because it is easier to criticize a federal program than to try to adapt to the inexorable forces of a global economy.

Not surprisingly, Respondents' criticisms of the Pork Act do not reflect a coherent or consistent position. Because the case was decided on cross-motions for summary judgment, no trial took place. However, the following deposition testimony was taken and filed with the district court:

- One of the Respondents said he could not give a single example of a Pork Act-funded statement or ad to which he objected. He admitted that eliminating the Pork Checkoff probably would not give him a better price for his hogs.

- Another Respondent said he objected to "Pork: The Other White Meat." because "[i]t's discriminating between white hog farmers and black hog farmers. . . . It pins (sic) white hog farmers against black hog farmers. . . . That's a racial objection." (This Respondent admitted that he did not know and never had spoken to an African-American hog farmer.)

- A third Respondent admitted that he was "retired" from hog farming, just did his "activism" now, and had paid only 43 cents in Pork Checkoff in 2002 and $8.77 in 2001.

- The fourth individual Respondent conceded that she currently owns only three hogs, and that all her sales of hogs in recent years have been to a § 501(c)(3) organization operated by herself and her husband that pays her a guaranteed price of 15 percent above the market for her hogs. This charitable organization is heavily subsidized by USDA grants in excess of $100,000 per year, and uses some of these federal taxpayer dollars to publish newsletters that criticize the Pork Act.

Notably, none of the Respondents is forced by the Pork Act to say anything to which she or he objects. All of them can and in fact do say whatever they want about hog farming.

5. In opposing Respondents' claim that Pork Act-funded advertising violated their First Amendment rights, Petitioners relied primarily upon the government speech doctrine. Petitioners contend that the government is speaking through the Pork Checkoff and, accordingly, no constitutional objection may be raised to it. The district court, however, rejected Petitioners' government speech defense because the "funding scheme" for the speech consists of assessments on pork producers. *See* 45a. On appeal, the Sixth Circuit upheld the district court, but employed a somewhat different analysis.

The Sixth Circuit found that the Pork Act does not involve government speech for three reasons. First, the Pork Act benefits a specific industry – pork producers. Second, while USDA may adopt or approve the speech funded by the Pork Act, it does not create most of that speech. Third, as noted by the district court, the Pork Act is not funded by general tax revenues, but by an assessment of 0.4 percent on sales of hogs or the slaughter of hogs for sale. On these grounds, the court of appeals invalidated the Pork Act in its entirety. *See* 8a-9a.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. Introduction.

There are several vital reasons why the Court should grant the writ. A highly effective and efficient $50 million government commodity program that has been in existence for almost twenty years will vanish if the Court withholds consideration of this case. The record conclusively establishes that the Pork Act is highly effective and greatly benefits all pork producers, including those who object to it. Moreover, the Pork Act is but one of a number of similarly situated commodity programs that are in imminent danger of disappearing unless the Court considers the constitutional issue presented in this case.

The most compelling reasons for granting review, however, arise out of the following combination of circumstances: (1) the sheer importance of government speech; (2) the apparent confusion prevailing among lower courts on this issue; and (3) the jarring precedent established by the Sixth Circuit's opinion. Unless the application of the government speech doctrine to government-sponsored programs and campaigns is promptly reviewed and clarified by this Court, we will likely see a cascade of challenges to government programs and campaigns involving the health, safety, and welfare of Americans.

Needless to say, the Sixth Circuit's decision conflicts with relevant decisions of this Court and at least one other circuit. This Court has never endorsed, let alone mentioned, the Sixth Circuit's three-part test. To the contrary, in its most recent government speech decision, this Court explained that "the salient point" separating private from government speech is whether the program in question

"was designed to facilitate private speech, not to promote a government message." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). Similarly, the Ninth Circuit recently found that messages posted by teachers on a school bulletin board amounted to government speech because they were a "manifestation of the school board's policy. . . . " *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000). Yet instead of considering whose message is being promoted, the Sixth Circuit invented its own three-part test based largely on irrelevant factors.

Not only does the Sixth Circuit's ruling detour from constitutional precedent, but it also comes at a time when lower courts are apparently befuddled by the government speech doctrine. Although the Ninth Circuit got it right in *Downs*, other appellate judges have complained about the lack of clarity in this Court's pronouncements on government speech. *See, e.g.*, *Wells v. City and County of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001); *Sons of Confederate Veterans, Inc. v. Commission of Virginia Dept. of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., dissenting from denial of rehearing en banc). This confusion extends to the numerous agricultural commodity promotion programs. As one might have predicted when this Court declined to reach government speech in *United States v. United Foods, Inc.*, 503 U.S. 405, 417 (2001), but said that it involved "difficult issues," lower courts have gone in different directions, even going so far as to reach different conclusions based on the very same record. Compare *Livestock Marketing Assn. v. U.S. Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003) (overturning the Beef Act), with *Charter v. U.S. Department of Agriculture*,

230 F.Supp.2d 1121 (D. Mont. 2002) (upholding the Beef Act on an identical record).

This Court should grant the petition and reverse the Sixth Circuit's decision. Congress enacted the Pork Act; it has had dramatically and demonstrably beneficial effects for pork producers; and it should not be discarded based on an unprecedented and illogical view of constitutional law.

II. The Sixth Circuit's Opinion Conflicts with Prior Decisions of this Court and at Least One Other Circuit.

There is no constitutional right to keep the government from speaking. A pacifist may object to an ad for the U.S. Army; a libertarian to an anti-drug message; and a tobacco farmer to a speech by the Surgeon General. But none have the right to enjoin the government from speaking because their taxes or other exactions are being used for those forms of speech. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990).

The proposition that the government may say things with which some financial supporters of that speech disagree is so obvious that it needed little repetition until recently. It only became necessary to restate the obvious in the last few decades, as this Court confronted cases in which persons asserted First Amendment rights not to financially support speech with which they disagreed. In

response to these cases, this Court has made it clear that the government speech rule operates as a limiting principle on First Amendment claims. *See Velazquez*, 531 U.S. at 541-42; *Board of Regents of University of Wisconsin v. Southworth*, 529 U.S. 217, 229 (2000); *Rosenberger v. Rector & Visitors of University of Virginia,* 515 U.S. 819, 833 (1995).

As noted above, what may be less clear is the *scope* of the government speech rule. Nonetheless, Petitioners believe that several decisions of this Court have marked a dividing line between private speech and government speech.

Thus, private speech consists of:

- Ideological activities of the Detroit Federation of Teachers that are unrelated to collective bargaining. *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-36 (1977).
- Statements made by the State Bar of California lobbying for or against state legislation on polygraph testing, possession of armor-piercing ammunition, rights to sue, etc. *Keller*, 496 U.S. at 15-16.
- Statements made by 343 different student organizations at the University of Virginia, which had contractually agreed they are neither part of nor controlled by the University. *Rosenberger*, 515 U.S. at 823-25.
- Statements made by student organizations at the University of Wisconsin such as Future Financial Gurus of America, the International Socialist Organization, the College Democrats, the College Republicans, and the American Civil Liberties Union Campus Chapter. *Southworth*, 529 U.S. at 223.

- Statements made by Legal Services attorneys representing welfare claimants. *Velazquez*, 531 U.S. at 538-39.

On the other hand, government speech includes:

- Invocations delivered by students (where the students chose the texts of the invocations) pursuant to school district policy before high school football games. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306-09 (2000).

- Statements made by physicians on family planning topics carrying out a federal program to support preventive family planning. *Rust v. Sullivan*, 500 U.S. 173, 178-80 (1991).

The Pork Act is not like *Rosenberger* or *Southworth* – where the government decided to let a hundred flowers bloom, and then refused to water one of them. Nor does this case involve speech by an outside actor intending to influence the government, as in *Abood*, *Keller*, or *Velazquez*. (Indeed, it is strictly forbidden for Pork Checkoff funds to be used to influence legislation or governmental policy. 7 U.S.C. § 4809(e); 7 C.F.R. § 1230.74(a). *See* 66a, 71a.)

Rather, since 1985, the government through its elected representatives has chosen to convey the message to the public that pork, generically, is healthy and nutritious, just as it has chosen to fund countless advertisements that drugs and smoking are harmful to health. The generic ads run by the National Pork Board and State Pork Producer Associations, all of which have been prescreened and pre-approved by USDA, are delivering a government message. It was Congress – not some unelected private entity – that decided in 1985 to promote pork generically.

Regardless of how one reads this Court's government speech precedents, the Sixth Circuit's decision to invalidate the Pork Act cannot be fit within them. "The simplest and clearest example of government speech advancing a point of view is provided when a 'law' specifically adopts a program of promoting a specific message." Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1384 (2001). That is exactly what happened here in 1985.

Furthermore, it bears particular emphasis here that, unlike in *Rust*, a federal cabinet department has not merely decided on a general message and left it to others to deliver, but that department has actually reviewed and (where necessary) wordsmithed every advertisement. Even the district court acknowledged that "[r]eview of the organizational structure behind Pork Act advertising evidences a complex structure with extensive government oversight." *See* 40a.

The Respondents conceded below that USDA makes "substantive" modifications to 4 percent of the ads that it reviews. *If these ads involved private speech, one might ask, why is USDA telling the Pork Board and State Pork Producer Associations what to say? Would that not be a flagrant First Amendment violation?*[4] Indeed, prior restraints, such as USDA performs on Pork Act-funded advertisements and producer communications, raise the

[4] Notably, prior to this litigation, Respondent Campaign for Family Farms had asked USDA on several occasions to restrict or prohibit certain categories of Pork Checkoff-funded communications.

most serious First Amendment concerns and – as a practical matter – are almost never sustained against constitutional attack. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (the Pentagon Papers case). Yet prior, content-based restraints are the norm with respect to Pork Act-funded speech, demonstrating that this is government, not private, speech.

Moreover, the Pork Checkoff is not just subject to "traditional political controls," *Southworth,* 529 U.S. at 229, but to some non-traditional controls as well. Of course, the Pork Checkoff could be terminated through the normal legislative process (and indeed Respondents have aggressively lobbied for its termination). However, the Secretary of Agriculture also has discretionary authority to terminate the Pork Checkoff under 7 U.S.C. § 4812(a) (67a-68a). Thus, Respondents (or anyone else) can bring about termination of the Pork Checkoff by any of the following three methods: (1) convincing Congress to change the law; (2) electing a President whose Secretary of Agriculture decides that the Pork Checkoff is not effectuating the purposes of the Pork Act; or (3) obtaining 15 percent support for a binding referendum on the Pork Checkoff. 7 U.S.C. § 4812(b) (68a).

Additionally, the Sixth Circuit's decision is totally at odds with the Ninth Circuit's ruling in *Downs*, 228 F.3d 1003, that sundry materials posted by faculty and staff on a school bulletin board constituted government speech. In that case, the Los Angeles school district had issued a memorandum stating that it would provide posters and materials in support of Gay and Lesbian Awareness Month. Staff members at one school created a bulletin board where individual faculty and staff also could post their own separate materials "subject to the oversight of

the school principal, who had ultimate authority within the school over the content of the boards." *Id.* at 1006. A number of faculty and staff posted messages urging tolerance and non-discrimination (including, of course, many materials they had not written themselves); one teacher, however, tried to post materials critical of homosexuality on a bulletin board and was prevented from doing so. In rejecting the teacher's freedom of expression claim, the court of appeals held that the bulletin boards were "the government itself speaking." Specifically, the court concluded, "Because the bulletin boards were a manifestation of the school board's policy to promote tolerance, and because [the school administration] had final authority over the content of the bulletin boards, all speech that occurred on the bulletin boards was the school board's and LAUSD's speech." *Id.* at 1012. Consistent with this Court's precedents, the Ninth Circuit focused on whether a government message was being delivered, *i.e.*, whether the speech was a "manifestation" of government "policy."

To summarize: (1) all generic advertisements funded by the Pork Act deliver a congressional message; (2) all of them are scrutinized in advance by USDA and can be (and often are) modified or rejected; and (3) USDA literally owns the speech as any copyrights, trademarks, inventions, and publications created from Pork Checkoff dollars are the property of the federal government. In short, the government has more control over the message than it had in *Rust*, *Santa Fe* or *Downs*. Since those cases were found to involve government speech, this case clearly does.

III. The Sixth Circuit's Three-Part Test Creates a Dangerous Precedent with Far-Reaching Implications.

The Sixth Circuit's decision is likely to have sweeping, adverse consequences. While the Sixth Circuit's reliance on a three-part test (*see* 8a-9a) may make its opinion *seem* moderate, its view of government speech is truly radical. The plain facts are:

1. Virtually all government programs are targeted to particular groups or industries.

2. Much of what the government says is not the original work product of its own employees.

3. Governments are creative at raising money and levy various taxes, assessments and user fees all the time. Indeed, in tight budgetary times, these kinds of exactions tend to proliferate, as elected representatives take the view that those who directly benefit from a government program ought to pay for it.

Thus, a government speech analysis based on these three tests will inevitably call all sorts of federal programs into question.

To begin with, most federal programs – not just the Pork Act – are designed to benefit a particular group. That is often Congress's intent, *i.e.*, to help one sector of our economy, in the belief that this makes America stronger and better as a whole. Congress demonstrated this intent when it enacted the Pork Act: "Congress finds that . . . the production of pork and pork products plays a significant role in the economy of the United States. . . . [T]he maintenance and expansion of existing markets, and development of new markets, for pork and pork products are vital

to . . . the general economy of the United States. . . . " *See* 56a. Congressional intent to benefit a specific industry is not a reason for striking down a federal program.

Furthermore, most of us cannot write like Ralph Ellison, Edith Wharton, or F. Scott Fitzgerald. Federal employees are no exception. Like the rest of us, therefore, they frequently borrow from, ratify, approve, or adopt the speech of others. However, it does not make speech any less the government's because the government asked people with greater ability and expertise to craft the government's message.

Just as the government routinely contracts for outside services in other areas, in this case USDA has partnered with experts, subject to various controls over the final product. If carried to its logical conclusion, the Sixth Circuit's position could bar the government from obtaining private assistance in any communications-related area. To put it another way, no one would suggest that under the First Amendment, a pamphleteer is entitled to less protection because he or she did not "create" the pamphlet. By the same token, however, the government must be permitted to speak through speech "created" by others as well. Indeed, that is one teaching of *Rust*.

Lastly, much of what our government does is not funded by general revenues. The government levies all kinds of narrowly focused taxes, user fees, and assessments – on vehicles, gasoline, airline tickets, etc. This has nothing to do, logically or legally, with whether the speech funded by that exaction is that of the government. It would be absurd to say that an airline passenger has a First Amendment right to enjoin an airport authority from

displaying an anti-terrorism message in an airport terminal, just because that message was funded by security fees imposed on that passenger rather than general tax revenues.

Moreover, the suggestion that government speech has to be financed from general tax revenues flies directly in the face of both *Rosenberger* and *Southworth*. In *Rosenberger*, the funding mechanism was "a mandatory fee of $14 per semester assessed to each full-time student." 515 U.S. at 824. Yet, when this Court indicated that the University of Virginia could "disburse[ ] public funds to private entities to convey a governmental message," *id.* at 833, it was taking for granted that this $14 per student per semester assessment amounted to "public funds." The constitutional problem did not arise from the fee, but from what the university was doing with it. Specifically, the university was utilizing the fee "to encourage a diversity of views from private speakers" while also imposing a content-based restriction. *Id.* at 834.

Similarly, just four years ago, in *Southworth*, 529 U.S. at 229, this Court said, "The government, as a general rule, may support valid programs and policies by taxes *or other exactions* binding on protesting parties" (emphasis added). This Court added, "If the challenged speech here were *financed by tuition dollars* and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." *Id.* (emphasis added). Thus, according to *Southworth*, government speech may be financed by "other exactions," not just by general revenues.

By any reasonable standard, the "Pork Tax" – which is analogous to a sales tax and is paid by corporations,

partnerships and individuals alike as a flat percentage of the sale price or value – is less targeted than the fees that were involved in *Rosenberger* and *Southworth*.

The Sixth Circuit's tripartite test not only is a startling deviation from precedent, it also presents a threat to commonplace government programs. The threat is particularly serious here, because the Sixth Circuit also decided to invalidate this $50 million nationwide program in its entirety, even though only four named individuals had objected to it and even though most of the program does not involve speech. The court of appeals failed to mention that both the Pork Act and the accompanying regulations contain provisions allowing for specific relief that would have cured all of Respondents' objections – even assuming those objections to be valid. 7 U.S.C. § 4814(a) (authorizing Secretary to grant exemption from order); 7 C.F.R. § 1230.90 (severability clause). By striking down the entire Pork Act (not just the advertising portions), as to all persons (including pork producers who strongly support it), the Sixth Circuit has now extended an open national invitation to objectors. Anyone who is subject to an assessment or exaction for a federal program that includes some speech may come to Kentucky, Michigan, Ohio, or Tennessee and file a lawsuit to shut down the entire program. There is no reason for anyone to challenge an agricultural commodity program anywhere else.[5]

[5] What the Sixth Circuit did here would be analogous to a decision in *Wooley v. Maynard*, 430 U.S. 705 (1977), that New Hampshire had to recall every license plate in the state.

Consider the following examples.

Under the Food, Drug & Cosmetic Act, drug manufacturers seeking approval of a new drug must file an application and pay a user fee. 21 U.S.C. §§ 355, 379h. That fee covers the costs of FDA's review process. FDA then assigns an advisory panel (comprised exclusively of private individuals) to review and report back on the drug. *Id.* § 355(n). Under the Sixth Circuit's opinion, that system violates the First Amendment. It is an "abridgment" of drug manufacturers' First Amendment rights because they have to pay for speech by advisory panel members with which they may disagree.

California has a $.25 per pack surtax on cigarette sales to fund various programs, including anti-tobacco advertising. In other words, California uses taxes paid by a specific industry to fund advertising that condemns that industry. Is this government speech? Under the Sixth Circuit's decision, clearly not. If it is unconstitutional to impose an assessment on an industry to fund speech benefiting it, as the Sixth Circuit concluded, then certainly the same must be true of an assessment to pay for speech attacking that industry. The federal district court in California upheld the surtax, *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F.Supp.2d 1085, 1104 (E.D. Cal. 2003), but had the case arisen in a different part of the country we can only assume the outcome would have been different.

Many governments use special taxes or assessments (such as on hotel rooms or rental cars) to promote tourism. For example, Hawaii has a Tourism Authority (a public agency, although its members are not state employees). The Tourism Authority receives most of its funding from a transient accommodations tax, then transfers much of that

funding to a private entity known as the Hawaii Convention and Visitors Bureau. The HCVB recently has come under criticism for its spending and management practices. *See* Honolulu Advertiser, January 10, 2004. Under the Sixth Circuit's reasoning, it would seem relatively easy for someone to shut down the HCVB by bringing a First Amendment claim, arguing that he or she had to pay the accommodations tax, thinks Hawaii's beaches are getting too crowded, and objects to paying for advertising that touts Hawaii's sunshine and temperate climate. Or, objection could be raised to some other aspect of HCVB's advertising, such as a controversial recent joint promotion with Disney.

These are not improbable hypotheticals; indeed, one of them is already an actual lawsuit. And, they demonstrate why clarification of government speech doctrine should be an urgent priority of this Court.

IV. The Government Speech Doctrine Has Created Both Confusion and Conflict in Lower Courts and There is a Pressing Need to Address It Now.

Although the Sixth Circuit has adopted a particularly odd approach to government speech, it is not the only lower court apparently confused by this Court's pronouncements.

The Sixth Circuit's decision has come at a time when agricultural commodity promotion programs are already in a state of legal chaos. In *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997), this Court decided that mandatory assessments to fund generic advertising of California tree fruits were constitutional. However, four

years later, this Court upheld the constitutional challenge to the Mushroom Act in *United Foods*, 533 U.S. 405. At the same time, this Court expressly declined to rule on the government speech argument because it had not been timely raised. *Id.* at 417.

Since then, there have been a host of lawsuits over these programs centering on the government speech issue – with conflicting results. In *Livestock Marketing Assn.*, 335 F.3d at 723-26, the Eighth Circuit seemingly conflated government speech with the germaneness analysis in *United Foods*, and concluded that because the Beef Act failed the *United Foods* germaneness test, the Beef Check-off program could not be considered government speech – even though *United Foods* had expressly reserved the government speech issue. In *Charter*, 230 F.Supp.2d at 1139, the court reviewed the very same record as in *Livestock Marketing Assn.* and found that the Beef Check-off did involve government speech because the government "disseminates its chosen message by way of private speakers." In *Pelts & Skins, L.L.C. v. Jenkins*, 259 F.Supp.2d 482 (M.D. La. 2003), the court found that a state program to benefit the alligator industry did not involve government speech because it was funded by licensing fees rather than "general tax dollars." Thus, the only certain statement one can make about these agricultural commodity programs is that courts have divergent views as to whether and when the government speech doctrine applies.

Since this Court observed in *United Foods* that government speech presented "difficult issues" (533 U.S. at 417), it is not surprising that the Court's decision has spawned considerable litigation already, and that lower courts have reached different conclusions.

Having the benefit of a full record, which was not available in *United Foods*, this Court should complete the task of ruling on the constitutionality of these agricultural commodity promotional programs. Individuals and entities like the Petitioners here should not be penalized simply because the government failed to raise an argument on time in *United Foods*. The unfinished business from *United Foods* needs to be completed.

Furthermore, Petitioners believe this Court's pronouncements in *Rosenberger* and *Southworth* are clear, but since some lower courts seem to be getting a different message, *see Pelts & Skins, L.L.C.*, 259 F.Supp.2d at 490; *Summit Medical Center of Alabama, Inc. v. Riley*, 284 F.Supp.2d 1350, 1360-61 (M.D. Ala. 2003), it appears the lower courts need far more guidance on whether the government can pay for a speech-related program out of something other than general tax revenues.

Moreover, acts of Congress are at stake. The Pork Act alone is a $50 million a year federal program. As found by an exhaustive economic study, it contributes many times that figure in across-the-board benefits to all hog farmers, large and small. The Pork Act does not just provide generic advertising (although this is important enough), but also research into swine health, programs like Pork Quality Assurance ("PQA") to assure that pork is safe to eat, and initiatives to open up overseas markets. Congress has enacted numerous other commodity promotion programs, covering industries such as cotton, potatoes, eggs, honey, and soybeans.

Lastly, the government speech question reverberates far beyond just these commodity promotion programs. Information is becoming ever more important in our society, and governments are increasingly strapped for

cash. These two trends can be expected to result in a tide of government speech litigation in the future unless this Court brings greater clarity to the underlying constitutional principles. Cases have already been brought concerning special license plates, childbirth counseling, and tobacco advertising where government speech was the pivotal issue. None of these programs, however, has the proven economic track record of the Pork Act. Before this Act is permanently invalidated, we respectfully ask the Court to consider and resolve the fundamental question of whether the government is speaking.

CONCLUSION

This Court should grant a writ of certiorari and reverse the judgment and decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

EDWARD M. MANSFIELD
Counsel of Record
BELIN LAMSON MCCORMICK
ZUMBACH FLYNN,
A PROFESSIONAL CORPORATION
666 Walnut Street,
2000 Financial Center
Des Moines, IA 50309-3989
Telephone: (515) 243-7100

ROBERT C. TIMMONS
BOYDEN TIMMONS DILLEY & HANEY
3000 Old Town Riverfront Bldg.
85 Campau Ave. NW
Grand Rapids, MI 49503
Telephone: (616) 235-2300

Attorneys for Petitioners

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED OCTOBER 22, 2003

MICHIGAN PORK PRODUCERS ASSN., ET AL.,
PLAINTIFFS,

v.

ANN M. VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,
DEFENDANTS-APPELLANTS,

CAMPAIGN FOR FAMILY FARMS, ET AL.,
INTERVENORS/DEFENDANTS-APPELLEES.

MICHIGAN PORK PRODUCERS ASSN., ET AL.,
PLAINTIFFS-APPELLANTS,

v.

ANN M. VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,
DEFENDANTS,

CAMPAIGN FOR FAMILY FARMS, ET AL.,
INTERVENORS-APPELLEES.

Nos. 02-2337/2338.

United States Court of Appeals, Sixth Circuit.

Argued: March 14, 2003.

Decided and Filed: October 22, 2003.

Pursuant to Sixth Circuit Rule 206

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN AT GRAND RAPIDS. No. 01-00034 – Richard A. Enslen, District Judge.

Before: COLE, GILMAN, and BRIGHT, Circuit Judges.*

R. GUY COLE, JR., Circuit Judge.

Michigan Pork Producers Association, Inc., et al. ("MPPA") and the Secretary of Agriculture (the "Secretary") (collectively "Appellants") appeal the grant of summary judgment to Appellees Campaign for Family Farms, et al. ("CFF"). The United States District Court for the Western District of Michigan declared the Pork Promotion, Research and Consumer Information Act (the "Pork Act"), 7 U.S.C. § 4801 *et seq.*, and the Pork Promotion Order issued thereunder, 7 C.F.R. § 1230, unconstitutional and issued an injunction terminating all activities under the Pork Act and the Pork Promotion Order. The Act mandates that pork producers and importers (collectively "pork producers") pay assessments, known as "checkoffs," to fund promotion, research, and consumer information to benefit the pork industry.

The district court held that requiring the payment of these assessments violates the First Amendment rights of pork producers by compelling them to subsidize speech with which they do not agree. Appellants argue that: (1) the assessments subsidize a government program that advances the government's policy of promoting pork consumption, and, therefore, are immune from First Amendment scrutiny; (2) even if not part of a government program, the assessments are not compelled speech; (3)

* The Honorable Myron H. Bright, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

the Pork Act program that requires the collection of assessments, is a lawful restraint on commercial speech; and (4) even if the use of assessments for promotion under the Pork Act violates the First Amendment, the injunction ordered by the district court is overly broad in that it eliminates funding for programs that are constitutional.

For the reasons stated below, we AFFIRM the grant of summary judgment by the district court.

I. BACKGROUND

As part of the Food Security Act of 1985, Congress enacted the Pork Act. The purpose of the Pork Act is to:

> [A]uthorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research, and consumer information designed to –
>
> (A) strengthen the position of the pork industry in the marketplace; and
>
> (B) maintain, develop, and expand markets for pork and pork products.

7 U.S.C. § 4801(b)(1). The Pork Act provides for the creation of a National Pork Producers Delegate Body ("Delegate Body"). 7 U.S.C. § 4806. The Delegate Body – which determines the amount and distribution of the assessments – consists of pork producers, who are nominated by the state pork producers associations and appointed by the Secretary, and pork importers, who are appointed by the Secretary based on the amount of assessments collected from importers. 7 U.S.C. § 4806(b)(1). The Pork Act also provides for the creation of a 15-member National Pork

Board ("the Board"), 7 U.S.C. § 4808(a)(1), whose nominees are chosen by the Delegate Body and appointed by the Secretary. The Board is to develop and implement programs that fulfill the statutory mandates of promotion, research, and the provision of consumer information. 7 U.S.C. § 4808(b)(1). Although the United States Department of Agriculture ("USDA") provides some oversight over the Board, its Executive Vice President noted that it "is not to be considered as a governmental entity/agency or a government contractor." Moreover, the members of the Board receive no compensation from the government, and are reimbursed for expenses from the collected assessments. 7 U.S.C. § 4808(a)(1)(6).

Because the Pork Act explicitly states that its programs "shall be conducted at no cost to the Federal Government," 7 U.S.C. § 4801(b)(2), the Act provides for funding through mandatory assessments. 7 U.S.C. § 4809 *et seq.* In accordance with the provisions of the Pork Act, an initial Pork Promotion Order, establishing the Pork Checkoff Program, was issued by the Secretary in 1986. An initial referendum on the Pork Checkoff Program was held in 1988, and it was approved with the support of nearly eighty percent of pork producers. Payments are assessed against all producers of porcine animals that are sold or slaughtered for sale, and all importers of porcine animals, pork, or pork products.[1] 7 U.S.C. § 4809(a)(1). The Board receives all assessments, and distributes them according to formulas detailed in the Pork Act. Although

[1] In 2002, the Farm Security and Rural Investment Act of 2002 was passed, exempting organic hog farmers from paying the assessments. Pub.L. No. 107-171, § 1(a), 116 Stat. 134 (2002).

most of the funds support generic advertising, some of the money is spent to promote specific brands of pork products.

CFF, a non-profit advocacy group consisting of a coalition of four family farm organizations as well as individual hog farmers, is devoted to "ensuring the continued existence of family farms, particularly hog farms." Since 1998, CFF's primary goal has been to end the Pork Checkoff Program. CFF believes that the advertising funded by the Pork Checkoff Program favors those who sell processed meats, misrepresents the safety and desirability of large commercial farming, and downplays the benefits of family farms. In May 1999, after CFF filed petitions with the USDA seeking a referendum on the termination of the Pork Checkoff Program, then-Secretary Glickman decided to conduct a voluntary, "fairness" referendum on the checkoff program's future.

On January 11, 2001, Secretary Glickman announced that a majority of individuals had voted to terminate the program, and that as a result, he would terminate it. MPPA filed suit the next day to enjoin the program's termination. *Mich. Pork Producers Ass'n, Inc. v. Campaign for Family Farms,* 174 F.Supp.2d 637, 639 (W.D.Mich.2001) ("*MPPA I*"). On January 19, 2001, the district court issued a temporary restraining order pending hearing of the preliminary injunction motion. *Id.* Between the restraining order and the scheduled hearing, newly-appointed Secretary of Agriculture Veneman decided to preserve the Pork Checkoff Program, albeit with the funds collected by the Pork Checkoff Program administered directly by the Board instead of by the NPPC.

On June 25, 2001, the Supreme Court in *United States v. United Foods,* 533 U.S. 405 (2001), invalidated – as contrary to the First Amendment's prohibition against compelled speech – the Mushroom Checkoff Program created by the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 610 *et seq.* (the "Mushroom Act"). Like the Pork Act, the Mushroom Act required producers and importers of mushrooms to pay assessments that were primarily used to fund generic advertising that promoted the sale of mushrooms. CFF subsequently added to its complaint a First Amendment challenge to the Pork Act. *MPPA I,* 174 F. Supp.2d at 639. On December 4, 2001, the district court upheld the legality of Secretary Veneman's decision to preserve the Pork Checkoff Program. *MPPA I,* 174 F.Supp.2d at 643-44. The court explicitly stated, however, that its ruling had no effect on the other claims of the parties, including CFF's First Amendment challenges. *Id.* at 648.

CFF then voluntarily dismissed all of its remaining challenges to the Pork Checkoff Program, save for its First Amendment claims. *Mich. Pork Producers v. Campaign for Family Farms,* 229 F.Supp.2d 772, 777 (W.D.Mich.2002) (*"MPPA II"*). The parties filed cross-motions for summary judgment. On October 25, 2002, the district court granted CFF's summary judgment motion, holding that the First Amendment prohibited the Pork Checkoff Program and enjoining it in its entirety. *Id.* at 792. MPPA and the Secretary filed timely Notices of Appeal, and this Court subsequently granted a stay of the district court's injunction pending the appeal.

II. ANALYSIS

A. Standard of Review

We review the district court's grant of summary judgment *de novo*. *See Watkins v. City of Battle Creek,* 273 F.3d 682, 685 (6th Cir. 2001). Summary judgment is granted when the record, viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

B. Standing

Plaintiffs have standing under Article III to challenge the Pork Act. MPPA challenges the standing of CFF, claiming that: (1) several named appellees lacked standing because they do not pay assessments under the Pork Act and are unaffected by these provisions of the Pork Act requiring such payments; and (2) CFF does not have standing as an association under the test articulated in *Hunt v. Wash. Apple Adver. Comm.,* 432 U.S. 333, 343 (1977). In its brief to this Court, however, MPPA concedes that "two individuals, Mr. Smith and Mr. Jones, had standing to pursue their claims." Since at least one appellee in this action has standing, there is no need to consider MPPA's standing challenges to the individual appellees or to CFF. *See, e.g. Bowsher v. Synar,* 478 U.S. 714, 721 (1986) (explaining that if one plaintiff has standing, it is unnecessary to consider the issue of standing as to other plaintiffs in the action).

C. First Amendment Challenge

1. Governmental Speech

We first consider whether the subsidies generated under the Pork Act are properly analyzed as private speech or as governmental speech. The Supreme Court has made clear that the government may dictate the content and even the viewpoint of speech when the government itself is the speaker: "[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker. . . ." *Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 541 (2001). But the Court has yet to consider whether programs similar in nature to the Pork Checkoff Program constitute governmental speech – the Court declined to do so in *United Foods* because the government had failed to raise the governmental speech argument in the court below. *United Foods,* 533 U.S. at 417.

We conclude that the pork industry's extensive control over the Pork Act's promotional activities prevents their attribution to the government. First, the primary purpose of the Pork Act is to strengthen the market position of the pork industry and increase the domestic markets for pork and pork products. 7 U.S.C. § 4801. *See Keller v. State Bar of Cal.,* 496 U.S. 1, 13 (1990) (categorizing as private the speech of an organization created "not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession."). Second, unlike the typical scenario in which speech is considered governmental in nature, the programs' funding does not come from general tax revenues. *See, e.g., Rust v. Sullivan,* 500 U.S. 173 (1991); *Wells v. City and County of Denver,* 257 F.3d 1132 (10th Cir. 2001); *Downs v. Los Angeles Unified Sch. Dist.,* 228 F.3d 1003 (9th Cir. 2000), *cert. denied,* 532 U.S.

994 (2001). The Pork Act's funding comes solely from mandatory assessments paid by pork producers; the Act specifically forbids the use of government funds for its operations, and the Secretary and her staff are reimbursed from the assessments for any time spent working on activities under the Pork Act. 7 C.F.R. § 1230.73(c)(4).

Third, the government exercises only limited oversight over the programs. *See United Foods,* 533 U.S. at 417 (suggesting that merely *pro forma* government oversight over a promotional program counsels against classifying it as governmental speech). Only one USDA staff member is responsible for overseeing all of the duties relating to the Pork Checkoff Program, including attending all meetings of the Pork Board and reviewing all advertisements and communications it develops. The government itself does not propose or draft any of the advertisements. Indeed, the trademark for the most recognizable ad, "Pork. The Other White Meat," is owned by the NPPC, not the government. The Pork Board itself is comprised only of private pork producers, appointed by the Secretary based on nominations made by the private state pork producers associations – which themselves are run entirely by industry officials.

In sum, the costs and content of the speech in question are almost completely the responsibility of members of the pork industry. The First Amendment does not lie dormant merely because the government acts to consolidate and facilitate speech that is otherwise wholly private.

2. Compelled Speech

With its programs properly characterized as private speech, the constitutionality of the Pork Act turns on

whether pork is more like mushrooms or more like peaches. *See* F.J. Dindinger, *Free Speech for Mushrooms but not Peaches: Economic Regulations after* United Foods, Inc., COLO. LAW. 61 (April 2002). In *United Foods,* the Supreme Court held that the Mushroom Act – which provided for mandatory assessments that were used primarily to fund the generic advertising of mushrooms – violated the First Amendment's prohibitions against compelled speech. *Id.* at 411. However, in *Glickman v. Wileman Bros. & Elliott, Inc.,* 521 U.S. 457 (1997), the Supreme Court held that the Agricultural Marketing Agreement Act – which established mandatory assessments that funded a broad regulatory apparatus that included, as one of its many programs, promotional advertising of California tree fruit – did not constitute unlawful compelled speech.[2]

Because the Pork Act is nearly identical in purpose, structure, and implementation to the Mushroom Act, the Pork Act is unconstitutional under the analysis set forth in *United Foods.* The Pork Act mandates that:

> (3) Nothing in this chapter may be construed to –
>
> (A) permit or require the imposition of quality standards for pork or pork products;

---

[2] The federal courts have yet to weigh in on many other agriculture-promoting programs, including those touting "The Incredible, Edible Egg"; "Ah . . . the Power of Cheese"; and "The Touch . . . the Feel of Cotton . . . the Fabric of Our Lives." *See* Note, *The Constitution – It's What's for Dinner,* 2 WYO. L. REV. 617, 638 (2002). Earlier this year, however, the Eighth Circuit invalidated, as unconstitutional compelled speech, the mandatory assessment program bearing the slogan "Beef – It's what's for Dinner." *See Livestock Mktg. Ass'n v. United States Dep't of Agric.,* 335 F.3d 711 (8th Cir. 2003).

(B) provide for control of the production of pork or pork products; or

(C) otherwise limit the right of an individual pork producer to produce pork and pork products.

7 C.F.R. § 4801(b)(3). This scheme is a far cry from that upheld in *Glickman,* which – in addition to funding a promotional campaign – provided for regulated price, output, and quality, and also authorized joint research and development projects, inspections, and even standardized packaging. *Glickman,* 521 U.S. at 461. With the express prohibition on this type of non-promotional regulation, the Pork Act serves but one purpose: promotion. This case is therefore governed by *United Foods.*

MPPA attempts to distinguish the Mushroom Act from the Pork Act, claiming that most of the funds collected by the former were used for generic advertising, whereas only 13 percent of the total expenses in the 2001 Budget for all the activities funded under the latter were used for generic, nationwide advertising. In fact, the record reflects that the majority of the Pork Act's funds support advertising and promotions. The 2001 Budget called for $29,388,491, or 51 percent of the total expenses, to be used under the category of "Demand Enhancement." *Id.* Expenditures in this area were budgeted as follows:

Demand Enhancement Programming	$2,816,000
Advertising	$8,825,000
Merchandising	$5,400,000
Foodservice	$3,697,000
Pork Information Bureau	$2,800,000

Foreign Market Development/World Trade
$5,850,491

The district court also found that Pork Act programs providing for "education" and "research" were designed to further the Act's promotional goals. *MPAA II,* 229 F. Supp. at 777. Thus, the use of the assessments to fund advertising under the Pork Act is prohibited by the First Amendment because the expression that CFF and its members must support "is not germane to a purpose related to an association independent from the speech itself." *United Foods,* 533 U.S. at 415-16.

Finally, we find inapplicable to this case the relaxed scrutiny of commercial speech analysis provided for by *Central Hudson,* and relied upon by Appellants. The Pork Act does not directly limit the ability of pork producers to express a message; it compels them to express a message with which they do not agree. Even assuming that the advertising funded by the Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech – commercial or otherwise – that is compelled. *See Glickman,* 521 U.S. at 474 n. 18 (questioning whether "the *Central Hudson* test, which involved restrictions on commercial speech, should govern a case involving the compelled funding of speech"). It is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece.

3. Remedy

Finally, we conclude that the district court properly invalidated the Pork Act in its entirety. Because the Act has no "severability clause" providing for the preservation

of those statutory provisions that comply with the Constitution, we must invalidate the entire statute if the "balance of the legislation is incapable of functioning independently." *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 685 (1987). The very basis for holding that the Act violates the First Amendment – that its assessment of fees to promote pork is the chief goal of the Act, which does not create a broader regulatory program – prevents us from preserving other parts of the statute. *See Livestock Mktg. Ass'n v. United States Dep't of Agric.,* 335 F.3d 711, 726 (8th Cir. 2003) ("[T]he fact that the 'principal object' of the Beef Act is the very part that makes it unconstitutional, (i.e., compelling funding of generic advertising) [means that] no remaining aspects of the Act can survive."). It would be paradoxical to conclude simultaneously that Congress sought only to promote pork and that Congress still intended the incidental provisions of the Act to operate independently.

Nor does *United Foods* instruct otherwise. Appellant contends that: (1) this Court's decision in that case invalidated only part of the Mushroom Act; and (2) the Supreme Court affirmed the decision of this Court in its entirety. This argument misunderstands both decisions. The lone sentence in this Court's decision upon which Appellants rely – which states that "[t]he portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are likewise unconstitutional" – was part of the analysis that distinguished the Mushroom Act from the statute upheld in *Glickman,* and in its context is most fairly read only as a comparison of the two statutes. This reading is confirmed by the Supreme Court's discussion of the decision below, which states only that "the Sixth Circuit held this case is not controlled by *Glickman.*"

United Foods, 533 U.S. at 409. Even more illustrative is the Supreme Court's conclusion in *United Foods* that "[t]he only program the Government contends the compelled contributions serve is the very advertising scheme in question." *Id.* at 415. The decision to invalidate the advertising provisions of the Mushroom Act *by definition* resulted in the invalidation of the entire statute.

It would contort congressional intent if we were to take a statute that seeks entirely to promote a particular product and then strain to preserve the purportedly non-promotional provisions of that very statute. And the Supreme Court does not require that we do so. The district court was correct in striking down the entire Pork Act.

III. CONCLUSION

For the reasons stated, we AFFIRM the grant of summary judgment by the district court.

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED OCTOBER 25, 2002

MICHIGAN PORK PRODUCERS, et al.,
Plaintiffs/Intervenors/Cross-Defendants, v.
CAMPAIGN FOR FAMILY FARMS, et al.,
Defendants/Intervenors/Cross-Plaintiffs, v.
ANN VENEMAN, Secretary of the United States Department of Agriculture, et al., Cross-Defendants.

Case No. 1:01-CV-34

United States District Court, W.D. Michigan, Southern Division

October 25, 2002

OPINION

RICHARD ALAN ENSLEN, District Judge.

"[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Thomas Jefferson, Virginia Act for Establishment of Religious Freedom (1786), codified at Va. Code Ann. § 57-1 (Miche 2002).

INTRODUCTION

This matter is before the Court on Defendants/Interveners/Cross-Plaintiffs Campaign for Family Farms ("CFF") and its named members' (together "Cross-Plaintiffs") Motion for Summary Judgment and Motion to

Dismiss.[1] It is also before the Court on the Motions for Summary Judgment filed by Plaintiffs Michigan Pork Producers *et al*[2] and Defendants Secretary of Agriculture Ann Veneman and Agriculture Administrator A.J. Yates ("Governmental Defendants"). Related to the above Motions for Summary Judgment are Motions to Strike filed by both Plaintiffs and Governmental Defendants (together "Cross-Defendants").

Ignoring preliminary questions for the minute, fundamentally this case asks the question of whether the system of mandated assessments for generic pork advertising created as a result of the Pork Production, Research and Consumer Education Act of 1985, 7 U.S.C. § 4801 *et seq.*, ("Pork Act"), *i.e.*, an assessment of 45 cents on each $100 of pork per hog sold, violates objecting producers' First Amendment rights of free speech and association.[3] The pole stars guiding this decision are the 2001 decision of the United States Supreme Court in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) and its 1997 decision in *Glickman v. Wileman Brothers*, 521 U.S. 457 (1997). For the reasons which follow, the Court determines that the *United Foods* decision is the more pertinent precedent and that the Pork Act offends objecting

---

[1] The named members are James Dale Joens, Richard Smith, Rhonda Perry and Lawrence Ginter collectively.

[2] The other named Plaintiffs include the National Pork Producers Council, Pete Blauwikel, Bob Bloomer, High Lean Pork, Inc., California Pork Producers, Kentucky Pork Producers, Indiana Pork Producers, New York Pork Producers, and Ohio Pork Producers.

[3] This is the current assessment rate under 7 C.F.R. § 1230.112. The Pork Act itself allows assessments of between 25 and 50 cents for $100 of pork sold as to each hog sold. 7 U.S.C. § 4809(b).

producers' First Amendment rights of free speech and association.

PROCEDURAL BACKGROUND

This case began as a judicial challenge to a voluntary, "fairness" referendum of pork producers as to whether the Pork Order (the executive order authorizing the Pork Check-off Program ("Pork Program" or "Program") under the Pork Act) should continue. *See Michigan Pork Producers Association v. Campaign for Family Farms,* 174 F. Supp.2d 637 (W.D.Mich.2001). The result of the previous, disputed "fairness" referendum announced on January 11, 2001, was that 15,951 producers disfavored the Program and 14,396 producers favored the Program. *Id.* at 639. Plaintiffs initially challenged both the counting of the votes and the legal basis for Program termination. Subsequent to the filing of the Complaint, the change in Presidential administrations brought a new Secretary of Agriculture, Ann Veneman, who settled with Plaintiffs by agreeing not to terminate the Program based on the referendum vote. *Id.* This settlement was subsequently upheld by the Court as within the discretion of the Secretary. *Id.* at 648.

Notwithstanding the determinations in the published decision, this lawsuit continued. Cross-Plaintiffs filed cross-claims against the Governmental Defendants and the Plaintiffs. The constitutional basis for the new cross-claims was the First Amendment protections for freedom of speech and association. The precedential basis for the cross-claims was the Supreme Court's decision in the *United Foods* case (as well as the decision below by the Sixth Circuit Court of Appeals, *United Foods, Inc. v.*

United States, 197 F.3d 221 (6th Cir. 1999), which the Supreme Court affirmed). The parties have now filed multiple dispositive motions as to such claims as well as Motions to Strike portions of the evidentiary materials. Given the abundance of briefing and the need for prompt resolution, the Court dispenses with oral argument as to the pending motions.

FACTUAL RECORD

CFF is an advocacy group composed of four sub-groups, which are also community and public interest advocacy groups. Those groups are: the Land Stewardship Project; the Illinois Stewardship Alliance; Iowa Citizens for Community Improvement; and the Missouri Rural Crisis Center. (Perry Exhibit 1 at 5-7; Perry Exhibit 11 at 6-7.) Each of these organizations are compromised of individual members and each include substantial numbers of hog farmers. (Schultz Exhibit 6 at 40-44; King Exhibit 2 at 68, 70 & 79; Stokes Exhibit 26 at 58-61; Stokes Exhibit 27 at 159-64; Perry Exhibit 11 at 6-7, 22-23.) In addition to these sub-groups, CFF has 540 individual members who are hog farmers. (Perry Exhibit 4 at 233-34.)

CFF's agricultural interests are to promote family farming as opposed to the vertical integration of agricultural production, *i.e.,* factory farms. Since 1998, CFF has pursued as a primary goal the termination of the Pork Program. CFF views the Pork Program as beneficial to factory farming but antithetical to the interests of its members, who are family farmers. (*See* Perry Exhibit 11 at 6-9; Perry Declaration at ¶¶ 4-5, 14 & 18.) Plaintiffs seek a declaration that the Pork Program is unconstitutional and

an injunction preventing the operation of the Pork Program and the taking of mandatory assessments.

CFF's named members' particular objections are typical of CFF views. CFF members disagree with the generic advertising of pork, *i.e.*, the "Pork, the Other White Meat" advertising program paid for by use of the mandatory fees. CFF members assert that they raise hogs (animals), not pork (processed meat), and the Program supports a commodity they do not sell.[4] (Cross-Plaintiffs Brief, Dkt. No. 162, at 10.) They believe that this Program benefits packers and retailers to their detriment. (*See* Stokes Exhibit 12 at 1, stating that hog farmers' percentage of the revenue for each dollar of pork sold declined from 1996 to 2001 from 42.5 percent to 30.1 percent.) Cross-Plaintiffs also assert that generic advertising fails to promote the unique qualities and attributes of hogs raised on family farms. (Perry Declaration at ¶¶ 6, 7; Perry Exhibit 4 at 41-44; Joens Declaration at ¶¶ 13-14; Smith Declaration at ¶ 13.) Presumably, if Cross-Plaintiffs had control of their own advertising dollars, they might spend it in very different ways from a generic campaign. For example, a campaign to sell family farm products and to discourage consumption of mass produced pork. Cross-Plaintiffs also assert that the generic advertising promotes "lean pork" and that they are opposed to the production of excessively lean pork because of the unhealthy and inhumane conditions which they believe are connected with its production. (Perry Declaration ¶¶ 6-7; Smith Declaration

[4] The implication being that the Pork Program supports pork processors whose advertising and financial interests are diverse from family hog farmers.

¶ 13; Schultz Exhibit 6 at 60-61.) Additionally, some CFF members disagree with the generic advertising because they believe it misrepresents pork as a white meat and discourages the sale of bacon and ham. (Cross-Plaintiffs Brief, Dkt. No. 162, at 11.)

Additionally, the Pork Program supports some name brand advertising of large processors such as Hormel or Smithfield. CFF includes members such as Perry and Joens who have chosen to slaughter their own hogs in order to market hogs raised in non-factory conditions. These members strongly oppose name brand advertising of products sold by their competitors. (*Id.* at 11-12; Perry Declaration at ¶ 8; Schultz Exhibit 6 at 68.) Cross-Defendants have admitted that about $800,000 of funds are used in branded ads, but have further clarified that the branded ads assert generic messages (*i.e.*, "Pork, the Other White Meat"). (Hugh Dorminy Declaration at ¶¶ 26-27; Plaintiffs' Opposition, Dkt. No. 198, at 16.)

Pork Program funds also support certain "education" programs. Cross-Plaintiffs view these "education" programs as misinformation programs in that they propagate the view that large commercial farming operations are humane. Defendant Joens has stated:

> I raise my hogs using humane methods; they are not confined in pens their entire lives, as they are in many factory hog farms. I object to my checkoff dollars being used to publish information that helps cover up the abuses of those large corporate confinement facilities.

(Joens Declaration at ¶ 7.) Defendant Smith has similarly stated:

> These programs are for people that work in the corporate hog factories that have never seen a hog before they went to work for a huge conglomerate. I object because this is independent producer money going to a program that is focused on corporate hog factories and not the independent producers who believe in animal husbandry and who have been handling hogs humanely for years . . . .

(Smith Declaration ¶ 10.) Some CFF members also object to funding of "education" because they adamantly oppose this method of raising livestock. (Perry Declaration ¶¶ 7-9, 11-13 & 15.)

Another portion of the allocations are dedicated to research, especially research as to the use of antibiotics. The Pork Board has apparently funded expenditures called "Antimicrobial Resistance and Alternatives Research." Some CFF members take issue with the research and believe that positions taken by the Pork Board as to antibiotics jeopardize the safe consumption of pork. (Perry Declaration at ¶ 15; Smith Declaration at ¶ 10; Schultz Declaration at ¶ 8.) This research is also apparently related to the "education" goals of the Pork Board – *i.e.*, communications to producers to convince them to adopt practices favored by the Pork Board. For 2002, $454,000 of the Pork Program budget was allocated to education. (Perry Exhibit 3.)

CFF members also object to forced association with both the Pork Board, the National Producers Council (the Iowan not-for-profit corporation that until recently has done advertising for the Pork Board) and the state pork associations who are allocated 18 percent of the assessments for their own advertising. CFF members are

"forced" to associate with the Pork Board in that they are required to obtain a "Pork Quality Assurance" certification to sells hogs, which certification bears the name of the National Pork Board. (Smith Declaration at ¶ 7; Joens Declaration at ¶ 12; Smith Exhibit 2; Joens Exhibit 1.) Until 2002, the card also associated producers with the Producers Council. (Smith Exhibit 2.) State pork associations apparently are involved in a variety of marketing activities and lobbying efforts. Cross-Plaintiffs' statements imply that they have strong philosophical and commercial objections to these efforts, similar to their objections to generic Pork Act advertising.

As is clear from the Declarations and Exhibits filed by Cross-Plaintiffs, CFF and its members principally oppose the Pork Program for a variety of reasons. Though those reasons are not always consistent nor persuasive, they are, nevertheless, Cross-Plaintiffs' sincere and strongly-held views.

On the other side of the ledger, Plaintiffs and Government Defendants have made clear the economy value of the Pork Program to the agricultural economy. According to an impressive expert study of a team of researchers at Texas A & M University's Agriculture Department, the Pork Program has a very positive economic effect on pork producers. (*See* Deposition of Oral Capps, Ph.D. and Deposition Exhibits 110 & 112.) This study was commissioned in 1998, significantly before the filing of this suit, to justify the original Program. One of the conclusions of the study is that each dollar of assessments generates $4.79 for pork producers. (Capps' Deposition Exhibit 112 at ¶ 3.) Further, it is estimated that "demand enhancement" (principally advertising) generates $15.26 per dollar invested. (*Id.* at ¶ 4-5.) To put it somewhat differently, on

the sale of the typical hog, the producer earns an additional $1.17 because of the effect of advertising and marketing on demand. (*Id.*) The study also indicated that a mandatory program was necessary because a system of voluntary payments would suffer from "free riders" – *i.e.,* producers who did not want to contribute, but who wanted to benefit from a program. (*Id.* at ¶ 2.) Also, a voluntary program would not generate sufficient revenue. (*Id.*) Prior to any mandatory program, a voluntary program had operated and generated only $9 million dollars of assessments per year. (Plaintiffs' Reply, Dkt. No. 215, at 16, citing S. Rep. 99-145.)

CFF's economic expert, Dr. Siegert, disagreed with Dr. Capps' conclusions to a limited degree. Dr. Siegert suggested that a different discount rate should be used to assess the economic effects and that, applying the different discount rate, the use of assessments generates only $2.63 for pork producers per dollar of assessments. Dr. Siegert also expressed a criticism of the report because he felt that there were some "free riders" of the Pork Program – *i.e.,* that the Program benefits wholesalers and processors without making them contribute to the cost. However, Dr. Siegert essentially admitted that due to the complexity of "tax incidence" it was difficult to assess the accuracy of this criticism. (Siegert Deposition at 102-104.)

Notwithstanding such data, CFF conducted its own study of 500 hog farmers in September 2001. (Stokes Supplemental Declaration Exhibit 44.) Fifty-seven percent of those surveyed believed that large producers received the greatest benefits from the Program; only 38 percent of those surveyed believed that the Program benefitted all producers equally. (*Id.*) These survey results are consistent with the referendum vote announced by Secretary

Glickman in January 2001. The referendum vote itself evidences such widespread discontent with the Pork Program that it is bound to include many individuals who, like Cross-Plaintiffs, strongly disagree with Pork Program messages, and many others who simply believe that they can choose more economically effective uses of the funds assessed than can the functionaries of the Department of Agriculture.

STANDARD FOR SUMMARY JUDGMENT

As to the motions now before the Court, each of these motions turns on the standards set forth in Federal Rule of Civil Procedure 56.[5] Under Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The initial burden is on the movant to specify the basis upon which summary judgment should be granted and to identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The burden then shifts to the non-movant to come forward with specific facts, supported by the evidence in the record, upon which a trier of fact could find there to be a genuine fact issue for trial. *Anderson v. Liberty Lobby,*

[5] One of the motions requested dismissal under Rule 12 as opposed to summary judgment. Nevertheless, because the Motion to Dismiss raised matters outside the pleadings, it is properly analyzed under Rule 56. *See* Rule 12(b). Furthermore, the Motions to Strike raised issues pertinent to the Rule 56(e) requirements, which are discussed herein.

477 U.S. 242, 248 (1986). If, after adequate time for discovery on material matters, the non-movant fails to make a showing sufficient to establish the existence of a material disputed fact, summary judgment is appropriate. *Celotex Corp.*, 477 U.S. at 323.

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are jury functions. *Adams v. Metiva,* 31 F.3d 375, 382 (6th Cir. 1994). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Celotex Corp.*, 477 U.S. at 323 (quoting *Anderson,* 477 U.S. at 255). The factual record presented must be interpreted in a light most favorable to the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Rule 56 limits the materials the Court may consider in deciding a motion under the rule: "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." *Copeland v. Machulis,* 57 F.3d 476, 478 (6th Cir. 1995) (quoting Federal Rule of Civil Procedure 56(c)). Moreover, affidavits must meet certain requirements:

> [A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Fed.R.Civ.P. 56(e). The Sixth Circuit has held "that documents submitted in support of a motion for summary

judgment must satisfy the requirements of Rule 56(e); otherwise, they must be disregarded." *Moore v. Holbrook,* 2 F.3d 697, 699 (6th Cir. 1993). Thus, in resolving a Rule 56 motion, the Court should not consider unsworn or uncertified documents, *id.,* unsworn statements, *Dole v. Elliott Travel & Tours, Inc.,* 942 F.2d 962, 968-969 (6th Cir. 1991), inadmissible expert testimony, *North American Specialty Ins. Co. v. Myers,* 111 F.3d 1273, 1280 (6th Cir. 1997), or hearsay evidence, *Hartsel v. Keys,* 87 F.3d 795, 799 (6th Cir. 1996); *Wiley v. United States,* 20 F.3d 222, 225-226 (6th Cir. 1994).

LEGAL ANALYSIS

Motions to Strike

Cross-Defendants have filed Motions to Strike portions of the testimony of CFF's members. This testimony is obviously important since it provides a basis for standing and a basis for CFF's claims that its members oppose the use of Pork Program funds.

Governmental Defendants urge that CFF's members' objections to the Program are unreliable in that the members did not disclose the nature of their objections to particular Program expenditures in depositions predating their declarations. While it is true that it is improper for a witness to contradict deposition testimony by an affidavit or declaration for the purpose of avoiding summary judgment, *see Reid v. Sears, Roebuck and Co.,* 790 F.2d 453, 460 (6th Cir. 1986), this rule does not apply to a witness who is simply clarifying or expanding upon previous testimony. *Messick v. Horizon Industries, Inc.,* 62 F.3d 1227, 1231 (9th Cir. 1995). In this case, the challenge is unpersuasive since the Court does not recognize any

"inconsistency." CFF's members are hog farmers. They have evidently objected to the taking and use of Pork Program funds for some time. Nevertheless, those members continue to investigate the objects of the Program and continue to find different aspects of the Program which are disagreeable to them. The fact that after their depositions they could articulate more and specific reasons for disagreeing with particular Pork Program messages (while in the process of continual research) is not a reason to pretend that they do not have serious objections to Pork Act spending. Rather, it seems to be substantial proof that CFF members are thinking persons open to continually analyzing their views and that in the course of analyzing their views CFF members have found additional reasons for objecting to Pork Act spending. None of these arguments gives the Court any pause in concluding that CFF's members have sincerely held and strong beliefs which cause them revulsion to Pork Act speech and association.

As for Plaintiffs' Motion to Strike, the Motion provides a specific sentence by sentence review of each of the declarations. The Motion objects to many exhibits based on lack of foundation, which is a poor objection in the context of Rule 56(e). Rule 56(e) is foremost a "personal knowledge" requirement, which is unrelated to the traditional evidentiary objection for lack of foundation. No persuasive legal authority is cited for this argument.

Plaintiffs' Motion does tender objections to many exhibits based on lack of personal knowledge and hearsay. While these are valid objections, legally speaking, they are inappropriate in this instance. The statement of CFF members' objections (and the reasons for those objections) was not intended to prove the truth of their statements about the state of the agricultural economy and pork

promotions as a whole. It was only offered to prove that they have sincerely-held beliefs at odds with the use of Pork Act funds and particular Pork Program expenditures. Thus, hearsay and personal knowledge objections are not appropriate as to such testimony. Furthermore, the objections to the testimony (to the extent the testimony was intended to establish facts about the agricultural economy outside the speaker's direct knowledge) are generally not material. The point of this legal analysis is not to decide what is the best form of pork advertising, but rather to determine whether named Plaintiffs have strongly held beliefs at odds with the use of Pork Act assessments to fund generic advertising and other public expression contemplated by the Act.[6] Further, it makes little sense to analyze Plaintiffs' Declarations to discover how the Pork Program operates since the operation of the Pork Program is a matter which is not in significant question given the statutory, administrative and public record of its operations. Therefore, both Motions to Strike will be denied.[7]

Standing and Capacity

Cross-Defendants argue that CFF and its named members lack standing and that CFF lacks capacity to sue. Article III of the United States Constitution, of course, limits the exercise of judicial power to actual cases

---

[6] This is not to say that the Court has disregarded statements by CFF declarants which were within their personal knowledge as hog producers.

[7] The Court also adopts by reference Cross-Plaintiffs' responses to specific objections, contained at pages 7-14 of Cross-Plaintiffs' Opposition, Dkt. No. 219.

and controversies. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). The constitutional requirements for standing are also supplemented by the "prudential" requirements for standing – which ask whether prudential concerns should limit a federal court's exercise of jurisdiction. *Warth v. Seldin,* 422 U.S. 490, 498 (1975). Prudential considerations include whether a party is asserting a generalized grievance that is not peculiar to the party; whether the party is asserting the rights of third parties; and whether the injury alleged is outside of the "zone of interest" protected by the law creating the cause of action. *Cannon v. J.C. Bradford & Co.,* 277 F.3d 838, 853 (6th Cir. 2002). Rule 17 also imposes a "real party"/capacity requirement on organizational parties, which is related to the standing requirement. The burden of proof and persuasion as to standing and capacity is upon Cross-Plaintiffs. *See Lujan,* 504 U.S. at 561.

To begin with the capacity question, Rule 17(a) requires that actions be prosecuted and defended by a "real party in interest." Rule 17(c) allows suit by an unincorporated association to the same extent as recognized by the laws of the forum state. Rule 17 is not intended to limit capacity beyond any state law controlling association requirements nor beyond the usual rules for standing. In this case, based on the argument, Cross-Defendants' concerns as to CFF appear for the most part to relate to standing and not to any particular requirements of state law. Governmental Defendants have argued that CFF lacks capacity because they are a "campaign" and not an "association." However, this argument is not made in the context of any state law requirements for capacity. It is made without reference to any controlling legal definitions distinguishing a "campaign" and an "unincorporated

association." It is also made in the face of precedent which supports a view that association capacity be freely granted to associations meeting standing requirements.

Cross-Defendants' capacity argument is based on such cases as *Brown v. Fifth Judicial District Drug Task Force,* 255 F.3d 475, 476 (8th Cir. 2001), a case holding that a drug task force lacks standing to assert rights on behalf of the constituent law enforcement entities, and *Roby v. Corp. of Lloyd's,* 796 F. Supp. 103, 109-10 (S.D.N.Y. 1992), rejecting capacity of a business syndicate. These precedents are inapposite. As to the *Brown* case, an important and much different interest is served in the context of criminal tasks forces by limiting capacity to the constituent recognized legal entities forming the task force. This assures voters that the entities represented before Court are legally recognized and politically accountable to voters for the litigation choices made (as opposed to task force members who may have no allegiance to the voters of any given entity). Likewise, as to the *Roby* case, different interests are at play. A business syndicate is not a recognized legal entity and should not advocate financial interests contrary to those of syndicate members who are recognized legal entities. These precedents simply do not apply to unincorporated associations engaged in political and social advocacy, which often are fluid, created for the purpose of advocacy upon a single issue, and lacking in organization detail.[8]

---

[8] Governmental Defendants have also cited the cases of *McKinney v. United States Dept. of Treasury,* 799 F.2d 1544, 1553 (Fed.Cir. 1986) and *Minnesota Public Interest Research Group v. Selective Service System,* 557 F. Supp. 925 (D.Minn. 1983). These cases are about

(Continued on following page)

Standing requirements for unincorporated associations were explained by the Supreme Court in its decision in *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977). According to *Hunt,* the requirements for an unincorporated association to have standing to sue are: (1) the individual organization members would have standing in their own rights; (2) the interests sought to be protected are germane to the organization's purpose; and (3) neither the claims asserted nor the relief requested require participation by individual members. *Id.*

In this case, there is sworn unrebutted testimony that CFF includes 540 members, who oppose mandatory assessments on ongoing hog sales. (Schultz Exhibit 6 at 40-44; King Exhibit 2 at 68, 70, 76 & 79; Stokes Exhibit 26 at 58-61; Stokes Exhibit 27 at 159-64; Perry Exhibit 11 at 6-7, 22-23.) According to CFF's named members, these unnamed members are or were hog farmers subject to the assessments. (Perry Exhibit 4 at 233-34.) These individual members have been polled and contacted by telephone surveys and mailings to ascertain their opposition to the use of Pork Program funds. (Perry Exhibit 11 at 19-23.) This suit was brought only after CFF had received objections to the Pork Program from hundreds of its members. (Schultz Declaration at 4; King Declaration at 4.) This evidence and the lack of any real opposition to it establishes as a matter of law that the individual organization members would have standing to sue in their own right.

---

standing under the *Hunt* factors; they do not establish a separate "capacity" test for unincorporated associations.

One point related to the first prong of the *Hunt* test is the extent of discovery as to CFF's membership. CFF has declined discovery requests for its membership list. It has done so based on federal case law which recognizes a right of an association to not disclose its membership because such disclosure is likely to erode membership. As was recognized by the Supreme Court in *Bates v. City of Little Rock,* 361 U.S. 516, 523 (1960), "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective . . . restraint on freedom of association." *See also Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 498 (1975); *Familias Unidas v. Briscoe,* 544 F.2d 182, 192 (5th Cir. 1976) (holding that membership information could be compelled through a discovery request); *cf. Marshall v. Bramer,* 828 F.2d 355, 359-60 (6th Cir. 1987) (permitting sealed discovery as to membership of violent, white supremacist group for the purpose of prosecution of an arson suit).[9]

While the Court agrees in principle with Cross-Defendants that it must balance the need for discovery versus the First Amendment interests protected by non-disclosure, in this case the balance falls decidedly on the side of non-disclosure. The members are all persons subject to federal regulation by the Department of Agriculture. Whether true or not, those members are likely to

[9] The *Marshall* decision is distinguishable in that in such suit there was a much stronger need for the discovery; there was a lesser First Amendment interest at stake in that the defendants were engaged in non-protected and criminal activities in addition to protected activities; and the option of sealed discovery was a workable solution.

have substantial fears that disclosure of their names to the Department of Agriculture could result in their disparate treatment. Under this scenario, disclosures of those names would be corrosive to the individuals' rights of association so as to be forbidden by the First Amendment and by prudential concerns. It would make little sense to require such discovery in the context of a First Amendment speech and association challenge. If this were done, the working of the discovery mechanisms would impose an injury on Cross-Plaintiffs tantamount to the rights sought to be vindicated in the suit.

While it is also true that Governmental Defendants have cited cases for the proposition that associational standing should not be granted when opponents have not had a fair opportunity to discover facts concerning the standing of individual members, *see, e.g., American Immigration Lawyers Ass'n v. Reno,* 18 F. Supp.2d 38, 51 (D.D.C. 1998), the focus of those cases is whether enough information was supplied as to one or more identified members so as to give the district court a proper basis for finding of standing. In this case, Cross-Plaintiffs have identified four individual members who have been subjected to grueling discovery and as to whom a finding of standing is clearly required. The law does not require that CFF impose these burdens on all of its membership as a condition for suit.

It further bears mention that this discovery issue was not properly raised in the context of these motions. If Cross-Defendants were owed discovery, the proper course was to, long ago, file a motion to compel discovery under

Rule 37. If they objected to a discovery order by a magistrate judge, the proper course was to appeal it as clearly erroneous under Rule 72(a).[10] In the absence of any timely pursuit of the information through a proper procedural mechanism, the Court must view such complaints for what they are – chaff fit for the furnace.

In terms of the other prongs of the *Hunt* test, they too are satisfied. The interests sought to be protected in this suit (speech and association interests of family farmers) are germane to the interests of CFF – which is an acknowledged umbrella group for family farm organizations and individual farmers which has had since 1998 an objective to challenge the Pork Program. Also, individual members need not participate to obtain the very general relief sought – *i.e.,* a declaration of unconstitutionality and an injunction against future operation of the Program. Therefore, it is clear that CFF has capacity to sue. Since CFF has capacity to sue, the greatest part to the challenge to standing (against CFF) is not well taken.

Another general argument made by Plaintiffs is that some or all of the Cross-Plaintiffs lack standing because they receive federal producer subsidies as hog producers which are greater in value than the amount of assessments paid. While the premise may be true, it is irrelevant. Not a single case has been cited for the proposition that a producer does not have standing to object to

[10] It is also possible to contest this issue through the filing of a persuasive Rule 56(f) affidavit. It does not appear that this procedure was followed in this case and, even if it had been made, it was untimely in light of a failure to timely pursue the discovery through motion practice.

mandatory assessments because of a separate program of farm subsidies. The lack of precedent is telling in that the end of this argument is truly pernicious. This argument would deprive a litigant of standing and would deprive federal courts of inquiry as to all kinds of governmental abuses of the First Amendment whenever there was a separate and unrelated system of subsidies. If it was not clear to Plaintiffs when they wrote those words, they should understand now that this Court will not countenance any argument that the government has "bought" a system of unconstitutional treatment through the creation of a separate and unrelated system of subsidies.

As for the four individual members of CFF, Cross-Defendants have raised some questions as to the size of their hog production, the amount of their assessments paid, and the likelihood that they will pay future assessments. For instance, Lawrence Ginter, Jr. retired from hog sales in 2000, though he has "left the door open" as to whether he will sell hogs in the future. (Stokes Exhibit 51 at 44-48.) With respect to Ginter, his claims are not moot since they are "capable of repetition, but evading review." *Corrigan v. City of Newaygo,* 55 F.3d 1211, 1213 (6th Cir. 1995).[11] As for the questions raised by Cross-Defendants

[11] Even if the claims of Ginter were moot, the Court would still properly rely upon his objections to the particular Pork Program spending because his views are representational of at least some of CFF's membership, given the uncontested evidence of CFF's membership surveys. Furthermore, much of the argument about standing in this case is unnecessary. As stated by Cross-Plaintiffs, the *United Foods* case struck down the Mushroom Act based on the standing of a single producer. (Reply Memorandum, Dkt. No. 228, at 3.) In this case, Cross-Defendants admit standing as to Richard Smith and Smith's standing,

(Continued on following page)

regarding the other named members (with the exception of Richard Smith, who they concede has standing), a thorough analysis of the record reveals that these are inconsequential concerns in that the record evidence certainly supports that James Joens and Rhonda Perry have had some financial interests in hogs sold subject to assessment and continue to have some financial interests in hogs which will be sold subject to the assessment. (*See* Cross-Plaintiffs' Opposition to Plaintiffs' Motion for Summary Judgment on First Amendment Claims, at 27-28 and documents cited therein.) It is not required for standing that they have large swine herds nor that their hog ownership encompass any particular form of ownership (e.g., individual ownership as opposed to joint ownership). Therefore, the Court determines as a matter of law that Cross-Plaintiffs have both capacity and standing to assert their claims.

Unclean Hands

Cross-Defendants have urged that Cross-Plaintiffs should be prohibited from pressing its claims for equitable relief (declaratory judgment and injunction) due to the doctrine of unclean hands. Cross-Plaintiffs, though, have moved to dismiss this defense as a matter of law. This doctrine provides, generally, that a party seeking equity cannot obtain relief when the party is guilty of unconscionable conduct directly related to the matter of litigation. *Performance Unlimited v. Questar Publishers, Inc.*, 52

---

by itself, is sufficient to drive the litigation of the constitutional issues mentioned here.

F.3d 1373, 1383 (6th Cir. 1995); *In re Ben Jean Prevot,* 59 F.3d 556, 561 (6th Cir. 1995). In this case, the inequitable conduct is only charged against one CFF member, Rhonda Perry. It is claimed that she improperly operated Patchwork Farms as a for-profit business and advocacy organization even though it was registered as a non-profit organization in violation of 26 U.S.C. § 501(c)(3). It is argued by Cross-Defendants that this violation is related because Patchwork Farms purchased a large numbers of hogs from Rhonda Perry's husband.

Even assuming that there was some proof of a section 501(c)(3) violation, which the Court cannot find on this record, there is nothing in the record which directly connects the violation by the not-for-profit corporation to the subject matter of this suit. Furthermore, even if some of Rhonda Perry's hog sales which were subject to assessment were made to the not-for-profit corporation, it remains true that many other sales were made to other buyers. Moreover, even assuming a violation, the worst that can be said is that the not-for-profit corporation received tax subsidies to which it was not entitled. This is hardly proof that Rhonda Perry is guilty of the kind of grossly unconscionable misconduct which is usually the source of an unclean hands defense. *See Performance Unlimited, supra.* It is also hardly proof that the misconduct was directly related to the First Amendment challenges in this case. *See Shondel v. McDermott,* 775 F.2d 859, 869 (7th Cir. 1985) (holding that denial of preliminary injunction was inappropriate based on unrelated Hatch Act violation).

Cross-Defendants should also remember that the purpose of equity is to do equity. It would hardly be equitable to foreclose a constitutional argument regarding

compelled association and speech because of a past receipt of a tax subsidy by a separate not-for-profit corporation. It also goes without saying that the attempt by Cross-Defendants to apply this argument to not only Perry but to all Cross-Plaintiffs would be a true perversion of equity and an affront to public policy. *See Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 138 (1968) (rejecting unclean hands defense in context of Sherman and Clayton Act cases). As Judge Posner stated in *Shondel,* 775 F.2d at 869, "[e]quitable defenses such as unclean hands may also have more limited play in free speech cases than elsewhere. There is an analogy to antitrust law, where the Supreme Court has forbidden the recognition of a similar defense – *in pari delicto* (equally at fault) – in order to encourage antitrust enforcement." *See also Mitchell Brothers Film Group v. Cinema Adult Theater,* 604 F.2d 852, 861 (5th Cir. 1979). The interests at stake here are simply too weighty to be driven upon the shoals of failed litigation because of the alleged tax cheating of a single litigant.[12] As such, the Court determines as a matter of law that Cross-Plaintiffs are entitled to summary judgment on the defense of unclean hands.

Governmental Speech

Cross-Defendants argue that a First Amendment violation cannot be established on the present record

[12] By Cross-Plaintiffs' calculations, these issues will affect more than 80,000 hog farmers. (Cross-Plaintiffs' Motion to Dismiss, at 11.) They also evidently affect consumers, processors, retailers and countless workers.

because the speech resulting from the payment of assessments is "governmental speech." This defense is commonly applied in cases before this Court involving individuals who object to particular governmental messages, such as libertarians who oppose government funded anti-drug ads or pacifists who oppose army recruitment. As the Supreme Court has said,

> If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Keller v. State of Bar of California, 496 U.S. 1, 12-13 (1990).

In addition to these general principles, Cross-Defendants have supported their argument by reference to cases which, generally speaking, stand for the propositions that the government may tax and assess for the purpose of governmental speech, that the government may employ private actors to perform its speech, and that the speech need not be agreeable to those taxed or assessed. (*See, e.g.,* Plaintiffs' Brief in Opposition, at 3-5 and authorities cited therein.) Adding to the force of these arguments is the fact that the Supreme Court failed to address a government speech defense in the *United Foods* case because it had not been briefed or argued by the parties before the Sixth Circuit. *United Foods,* 533 U.S. at 415. Although the Supreme Court did not address the issue in *United Foods,* it did refer to its prior decision in *Lebron v. National Railroad Passenger Corp.,* 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995). In *Lebron,* the Supreme Court determined that Amtrack was a government entity for the

purpose of determining whether it could limit speech in its leased facilities. To quote the Court:

> "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."

Lebron, 513 U.S. at 400.

Review of the organizational structure behind Pork Act advertising evidences a complex structure with extensive government oversight. The National Pork Board is a 15-member Board appointed by the Secretary of Agriculture. 7 U.S.C. § 4808(a). The Act intended that the Pork Board employ private contractors for the purpose of carrying out Pork Act activities. However, the Act provided that, during an interim period, assessment funds would be supplied to the National Pork Producers Council (an Iowan not-for-profit corporation) to carry out the Act. *See* 7 U.S.C. § 4809. Since its creation, the National Pork Producers Council was the primary contractor for the Pork Board until July 1, 2001. (Stokes Declaration, Exhibit 2.) The Council's removal from that position resulted from the previous parties' February 28, 2001 settlement, which continued the Pork Program with modifications. Prior to the settlement, the previous parties were aware of a survey by the Office of Inspector General for the Department of Agriculture which criticized the extent to which the Pork Board had delegated authority to the Producers Council. (Plaintiffs' Motion, Dkt. No. 182, Appendix 14; Carpenter Deposition, Exhibit 51.) While the Producers Council is no longer the primary contractor, many of the

same personnel who worked for the Producers Council still perform the Pork Act functions previously performed by the Producers Council. (Stokes Exhibit 5 at 6; Stokes Exhibit 16 at 131-41, 146-51.) Prior to 2002, the majority of Pork Act advertising was identified as from "America's Pork Producers," in reference to the Producers Council. (Hemmelman Reply Declaration at ¶ 3.)

Under the Pork Act, the Pork Board's planning and operations are to be overseen and approved by the Secretary of Agriculture. 7 U.S.C. § 4808(b)(1). The Secretary also has administrative authority to fire Board members when continued service would be "detrimental" to the purposes of the Pork Act. 7 C.F.R. § 1230.55. Furthermore, the Internal Revenue Service has determined to treat the Pork Board as a governmental entity for tax purposes. (*See* Plaintiffs' Motion, Dkt. No. 182, Appendix 27.) It is also noteworthy that Pork Board members are selected on a representational basis from nominees made by the National Pork Producers Delegate Body. 7 U.S.C. §§ 4806(g) and 4808(a). The Delegate Body is a larger congress of pork producers which serves to recommend assessment rates and determine the percentage of overall assessments which are designated for use by state associations. 7 U.S.C. § 4806(h). The Delegate Body is nominated and elected within each state's producer association. 7 U.S.C. § 4807. There are currently 44 state pork associations, six of whom are parties to this suit. (Stokes Declaration ¶ 6; Stokes Exhibits 4 & 16.) The Department of Agriculture has no authority to appoint or approve the leadership of the state associations. 7 U.S.C. § 4802(16); 7 C.F.R. § 1230.25.

As stated earlier, the current assessment is 45 cents per $100 in market value for each hog sold. 7 C.F.R.

§ 1230.112. These assessments fund the Pork Board, whose budget was $57.5 million in 2001 (with a $4.5 million deficit). (Stokes Exhibit 1, NPPC 374.) Of this budget, $29.4 million was used for "demand enhancement." (*Id.*) Demand enhancement includes advertising, marketing and merchandising. (*Id.*, NPPC 274-378.) For 2001, state pork associations were allotted $10.4 million, or 18 percent of assessment funds. (*Id.*, NPPC 374.)

Consistent with the Pork Act, the Department of Agriculture regularly reviews the advertising and other project budgets of the Pork Board. (Carpenter Deposition at 33, 60-61; Dorminy Deposition at 101.) The Department also reviews the budgets of state associations. (Carpenter Deposition at 139-140; Dorminy Deposition at 60-61.) As part of this review, the Department may request modification of budgets or repayment of disallowed items. (Carpenter Deposition at 106-112.)

Similarly, the Department reviews each Pork Act advertisement before airing. (Carpenter Deposition at 173, 182.) This review is a general review to ensure that the advertisement is factual, is not disparaging of other commodities, and is consistent with the purposes of the Pork Act. (*Id.*) A similar review is done by the Department as to the advertisements of the state pork associations. (*Id.* at 148.) This kind of review results in amendments of only approximately four percent of the ads shown to the Department. (Hemmelman Reply Declaration at ¶ 3.)

While the Supreme Court did not address the governmental speech question in *United Foods,* this question has been addressed by federal courts in contexts very similar to the present one. In particular, the Third Circuit addressed this issue in the case of *United States v.*

Frame, 885 F.2d 1119, 1132 (3rd Cir. 1989). The *Frame* decision addressed the Beef Promotion and Research Act, 7 C.F.R. § 2901-11, which contained essentially identical mechanisms to those in the Pork Act for the funding and promotion of generic advertising to sell beef. The Third Circuit analyzed the issues in detail and specifically with reference to the Supreme Court's decisions in *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209 (1977) and *Wooley v. Maynard,* 430 U.S. 705 (1977). *Abood* upheld a First Amendment challenge to the use of union dues, by a public school system, to finance political speech. *Wooley* upheld a First Amendment challenge to a legal requirement that a state's citizen display an offensive state moto, "Live Free or Die." The *Frame* Court's analyzed the government speech issue as follows:

> The district court and the government have set forth sound reasons for concluding that the expressive activities financed by the Beef Promotion Act constitute "government speech." The Cattlemen's Board and the Operating Committee, the argument goes, are merely instrumentalities created to enable the Secretary of Agriculture to communicate his message that beef is good. As we have previously noted, the connection between these entities and the Secretary is a close one. The Board and Committee members serve at the pleasure of the Secretary of Agriculture: Cattlemen's Board members are appointed by the Secretary, 7 U.S.C. § 2904(1); 7 C.F.R. § 1260.141(b), while members of both the Board and the Operating Committee may be removed "if the Secretary determines that the person's continued service would be detrimental to the purposes of the Act," 7 C.F.R. § 1260.212. Moreover, the Secretary makes the final

> decisions on all projects funded under the Act. All budgets, plans or projects approved by the Board become effective only upon final approval by the Secretary, 7 U.S.C. § 2904(4)(C), and no contracts for the implementation of any plans may be entered into without the Secretary's approval, 7 U.S.C. §§ 2904(6)(A) & (B); 7 C.F.R. §§ 1260.150(f) & (g), 1260.168(e) & (f). Thus, when the Board or Committee "speaks," they do so on behalf of the Secretary of Agriculture and the government of the United States.

Nevertheless, though we find the issue a close one, the underlying rationale of the right to be free from compelled speech or association leads us to conclude that the compelled expressive activities mandated by the Beef Promotion Act are not properly characterized as "government speech." Justice Powell's *Abood* concurrence sought to ensure that "a local school board need not demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent." 431 U.S. at 259 n. 13 . . . . This attempt to cabin the *Abood* decision echoed prior sentiments that recognition of a broad right against compelled association and belief might obstruct normal governmental functions. In *Wooley v. Maynard,* for example, the Court determined that coerced bearing of the state slogan on one's car violated freedom of belief, but apparently acquiesced to the dissent's observation that the state was free to tax all citizens for erection and maintenance of billboards bearing state motto "Live Free or Die," *see id.,* 430 U.S. at 721 . . . (Rehnquist, J., dissenting) . . . . These situations, we believe, are distinguishable from the case now before us. Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus

between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. *See Wooley v. Maynard,* 430 U.S. at 721 . . . (Rehnquist, J., dissenting). In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.

> . . . This sort of funding scheme, with its close nexus between the individual and the message funded, more closely resembles the *Abood* situation, where the unions, as exclusive bargaining agents, served as the locutors for a distinguishable segment of the population, *i.e.,* the employees, or the *Wooley* case, where the state "require[d] an individual to participate in the dissemination of an ideological message . . . ," *Wooley,* 430 U.S. at 1434, . . . regardless of whether state-issued license plates constituted "government speech."
>
> Furthermore, Justice Powell's justification for distinguishing compelled support of government from support of a private association does not fit comfortably with a "self-help" measure like the Beef Promotion Act. According to Justice Powell, the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. 431 U.S. at 259 n. 13, 97 S.Ct. at 1811-12 n. 13. The Cattlemen's Board seems to

> be an entity "representative of one segment of the population, with certain common interests." Members of the Cattlemen's Board and the Operating Committee, though appointed by the Secretary, are not government officials, but rather, individuals from the private sector. The pool of nominees from which the Secretary selects Board members, moreover, are determined by private beef industry organizations from the various states. Furthermore, the State organizations eligible to participate in Board nominations are those that "have a history of stability and permanency," and whose "primary or overriding purpose is to promote the economic welfare of cattle producers." 7 U.S.C. § 2905(b)(3) & (4). Therefore, we believe that although the Secretary's extensive supervision passes muster under the non-delegation doctrine, it does not transform this self-help program for the beef industry into "government speech."

Frame, 885 F.2d at 1132-33.

Another federal court which has recently followed the reasoning in *Frame* is the District of South Dakota in its decision of *Livestock Marketing Assoc. v. United States Dept. of Agriculture,* 207 F. Supp.2d 992 (D.S.D. 2002.) Whereas the *Frame* court ultimately upheld the Beef Act speech as compelled, but non-ideological speech, the *Livestock Marketing* case enjoined assessments under the Beef Act due to the logic of the intervening *United Foods* decision. The Livestock Marketing case also commented,

> Common sense tells us that the government is not "speaking" in encouraging consumers to eat beef. After all, is the "government message" therefore that consumers should eat no other product or at least reduce the consumption of

> other products such as pork, chicken, fish, or soy meal? The answer is obvious.

Id. at 1006. While the Eighth Circuit Court of Appeals has granted a stay of the *Livestock Marketing* decision, the stay itself does not provide much guidance. The Eighth Circuit's Order granting the stay was silent as to the merits of the controversy and should only be interpreted as staying the decision to maintain the status quo pending decision and protect the Eighth Circuit's jurisdiction. *See Livestock Marketing,* Appeal No. 02-2769, Order of July 10, 2002 (8th Cir. July 10, 2002) (included as Moeller Exhibit No. 59).

This Court concurs with the *Frame* and *Livestock Marketing* decisions. What is present here is a self-help program for pork producers. Though the Secretary is integrally involved with the workings of the Pork Board, this involvement does not translate the advertising and marketing in question into "government speech" as that term has been interpreted by the federal courts. You cannot make a silk purse from a sow's ear. This defense fails as a matter of law.

First Amendment Speech and Association

Before deciding the question of whether either of the parties is entitled to summary judgment on the First Amendment Speech and Association Claims, the Court must set forth the backdrop of precedent created by the Supreme Court's *United Foods* and *Glickman* decisions. These precedents are such that once their applicability is decided, conclusions of constitutionality or unconstitutionality are but a stone's throw away.

In *United Foods,* the Supreme Court tackled the constitutionality of the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.,* which was similar in its mechanisms and purpose – *i.e.,* the promotion of mushroom sales by generic mushroom advertising through an industry self-help program. In *United Foods,* the Supreme Court indicated that it was not addressing the question of whether the "commercial speech" analysis under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 566 (1980) applied "for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." *United Foods,* 533 U.S. at 410.

Before reaching a conclusion, the Supreme Court reviewed its *Glickman* precedent, which was made in 1997. In *Glickman,* the Supreme Court upheld a generic marketing program that was created during the depression era, which involved California fruit trees and which was in the context of a "collectivized" marketing order. According to the *United Foods* decision:

> In *Glickman* we stressed from the very outset that the entire regulatory program must be considered in resolving the case. In deciding that case we emphasized "the importance of the statutory context in which it arises." 521 U.S. at 469, 117 S.Ct. 2130. The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity." *Id.,* at 469, 117 S.Ct. 2130. Indeed, the marketing orders "displaced competition" to such an extent that they were "expressly exempted from the antitrust laws." *Id.,* at 461, 117 S.Ct. 2130. The market for the tree fruit

> regulated by the program was characterized by "[c]ollective action, rather than the aggregate consequences of independent competitive choices." *Ibid.* The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising "d[id] so as a part of a broader collective enterprise in which their freedom to act independently [wa]s already constrained by the regulatory scheme." *Id.*, at 469, 117 S.Ct. 2130. The opinion and the analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.

United Foods, 533 U.S. at 412.

In contrast, the *United Foods* case involved a mushroom industry which was not collectivized, which was not exempt from anti-trust laws, and was not the subject of an expansive marketing order. *Id.* at 412. Thus, the Supreme Court rejected the application of *Glickman* and instead held that:

> the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity. *See, e.g., Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Keller v. State Bar of Cal.,* 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990).

Id. at 412.

In the case of pork marketing, this case resembles *United Foods* much more so than *Glickman.* As in the case of mushroom production considered in *United Foods,* pork is not subject to a comprehensive and collectivized marketing order. There is no necessity for a mandated marketing approach as part of a specialized industry. As such, the Court will apply the rule in *United Foods.*

As noted above, the *United Foods* decision relied in part on the Supreme Court's *Keller* decision. *Keller* is the precedent which forbids a state bar (as to which membership is required to practice law) from charging mandatory dues to members and then using those dues to pay for political or ideological advocacy as to which some members object. Similar to the *Keller* decision, the instant case involves mandated fees which are directed toward a discrete occupation (hog producers)[13] and which fund speech as to which some producers have sincere philosophical, political and commercial disagreements. Even aside from the important political and philosophical objections to such speech, the commercial interests of objecting producers to such speech is ample. In days of low return on agriculture, the decision of an individual farmer to devote funds to uses other than generic advertising are very important. Indeed, the frustration of some farmers are likely to only mount when those funds are used to pay for competitors' advertising, thereby depriving the farmer

[13] As part of the briefing Cross-Defendants have argued that the assessments are not directed at hog producers, but only the sale of hogs. This is a distinction without a difference. Hog producers, not others, sell hogs for slaughter. The assessments are directed toward them, just as surely as if the statutory language had branded their foreheads.

of the ability to pay for either niche advertising or non-advertising essentials (such as feed for livestock). This is true regardless of whether objecting farmers are correct in their economic analysis that the assessments and speech do not sufficiently further their own particular interests. In short, whether this speech is considered on either philosophical, political or commercial grounds, it involves a kind of outrage which Jefferson loathed. The government has been made tyrannical by forcing men and women to pay for messages they detest. Such a system is at the bottom unconstitutional and rotten.

For these reasons, the Court concludes that the mandated system of Pork Act assessments is unconstitutional since it violates the Cross-Plaintiffs' rights of free speech and association. *See also Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984) (discussing association rights); *Frame,* 885 F.2d at 1133-34; *LMA,* 207 F. Supp.2d at 1003-7; *Cal-Almond, Inc. v. Dept. of Agriculture,* 14 F.3d 429, 434-35 (9th Cir. 1993) (discussing issue in context of almond marketing order).

Remedy

Since the Court has granted Cross-Plaintiffs summary judgment as to liability, the question arises as to the scope of the necessary remedy. Cross-Plaintiffs have requested entry of a declaration, declaring the Pork Program unconstitutional, and the entry of an injunction, prohibiting the operation of the Pork Program and the collection of any assessments under the Pork Program. Plaintiffs and Governmental Defendants, however, argue that this scope of an injunction is much too broad. They urge that the Court should limit an injunction to a prohibition of making

mandatory assessments against only the named Cross-Plaintiffs in this suit. This suggestion was contrary to the remedies ordered in *LMA* and *United Foods.*

It appears to the Court, as argued by Cross-Plaintiffs, that such a remedy would be at the least unwise. The Pork Act was written without severability provisions. This indicated an intent by Congress that the Act's provisions rise or fall when considering constitutionality. By making the Act a "voluntary" assessment as opposed to a "mandatory assessment," there is no assurance that the funds generated will be sufficient to support the infrastructure which Congress created to carry out the Act. This is a real concern in this case because the statute was enacted to require "mandatory" assessments precisely because the previous system of voluntary contributions would not support a sizable program. The provisions of the Pork Act are also intertwined. *See Hill v. Wallace,* 259 U.S. 44, 70-72 (1922) (holding that Futures Trading Act was wholly unconstitutional in light of its intertwined provisions and lack of a severability clause).

In this context, a limited injunction would essentially re-write the Act in a manner inconsistent with judicial interpretation. *See Eubanks v. Wilkinson,* 937 F.2d 1118, 1122 (6th Cir. 1991) (citing *Blount v. Rizz,* 400 U.S. 410, 419 (1971)); *LMA, supra.* Additionally, as a practical matter, such would be impossible in this case. No suggested mechanism has been provided for making future assessments voluntary for claimants. Indeed, the identity of all of CFF's members are not even known. Finally, such an approach appears simply wrong-headed in the context of a program with a significant lack of producer support, such as the current Pork Program. Therefore, the Court

wil! approve the declaratory and injunctive relief requested by Cross-Plaintiffs. The Court finds that such equitable relief is not only supported by the substantive law, but also by the equitable factors which support injunctive relief.

While doing so, the Court will not make the ordered injunction effective until 30 days from the date of the Injunction. The purpose of this delay is to allow Governmental Defendants and Plaintiffs to exercise their rights to seek a stay under Federal Rule of Appellate Procedure 8. The Court also denies any request for stay by this Court, for the reasons stated in this Opinion, so that any further request for such may be made directly to the Court of Appeals.

CONCLUSION

For the reasons stated, Cross-Plaintiffs' Motion for Summary Judgment and Motion to Dismiss Affirmative Defenses shall be granted, and the motions of the other parties denied. Further, for relief of Cross-Plaintiffs, the Court will grant declaratory relief declaring the Pork Act unconstitutional and enjoining the collection of Pork Act assessments and the operation of the Pork Check-off Program. This relief will be ordered as part of Final Judgment and Injunction since this disposition completes the adjudication of claims in this matter.

FINAL JUDGMENT AND INJUNCTION

In accordance with the Opinion of this date;

IT IS HEREBY ORDERED that Cross-Plaintiffs Campaign for Family Farms, James Dale Joens, Richard

Smith, Rhonda Perry and Lawrence Ginter's Motion for Summary Judgment (Dkt. No. 162) and Motion to Dismiss (Dkt. No. 170) are GRANTED.

IT IS FURTHER ORDERED that Plaintiffs Michigan Pork Producers, National Pork Producers Council, Pete Blauwikel, Bob Bloomer, High Lean Pork, Inc., California Pork Producers, Kentucky Pork Producers, Indiana Pork Producers, New York Pork Producers, and Ohio Pork Producers' Motion for Summary Judgment (Dkt. No. 182) and Motion to Strike (Dkt. No. 220) are DENIED.

IT IS FURTHER ORDERED that Governmental Defendants Secretary Ann Veneman and Administrator A.J. Yates' Motion for Summary Judgment (Dkt. No. 183) and Motion to Strike (Dkt. No. 199) are DENIED.

IT IS FURTHER ORDERED that the Court declares the Pork Production, Research and Consumer Education Act of 1985, 7 U.S.C. § 4801 *et seq.* to be unconstitutional.

IT IS FURTHER ORDERED that the Court enjoins Cross-Defendants Michigan Pork Producers, National Pork Producers Council, Pete Blauwikel, Bob Bloomer, High Lean Pork, Inc., California Pork Producers, Kentucky Pork Producers, Indiana Pork Producers, New York Pork Producers, Ohio Pork Producers, Secretary Ann Veneman and Administrator A.J. Yates and those acting for them as officers, agents, employees and contractors, to cease the collection of assessments under the Pork Act and to cease the operation of the Pork Check-off Program effective 30 days from the issuance of this Final Judgment and Injunction.

IT IS FURTHER ORDERED that any request for stay of this Final Judgment and Injunction is DENIED and

Cross-Defendants are directed to seek such stay, should they so desire, from the Court of Appeals.

IT IS FURTHER ORDERED that attorney fees may be sought as directed under Federal Rule of Civil Procedure 54(d).

IT IS FURTHER ORDERED that costs may be billed as directed under Local Civil Rule 54.1.

APPENDIX C

EXCERPTS FROM THE PORK PROMOTION, RESEARCH, AND CONSUMER INFORMATION ACT OF 1985 ("THE PORK ACT")

7 U.S.C. § 4801. Congressional findings and declaration of purpose

(a) Congress finds that –

(1) pork and pork products are basic foods that are a valuable and healthy part of the human diet;

(2) the production of pork and pork products plays a significant role in the economy of the United States because pork and pork products are –

(A) produced by thousands of producers, including many small- and medium-sized producers; and

(B) consumed by millions of people throughout the United States on a daily basis;

(3) pork and pork products must be available readily and marketed efficiently to ensure that the people of the United States receive adequate nourishment;

(4) the maintenance and expansion of existing markets, and development of new markets, for pork and pork products are vital to –

(A) the welfare of pork producers and persons concerned with producing and marketing pork and pork products; and

(B) the general economy of the United States;

(5) pork and pork products move in interstate and foreign commerce;

(6) pork and pork products that do not move in such channels of commerce directly burden or affect interstate commerce in pork and pork products; and

(7) in recent years, increasing quantities of low-cost, imported pork and pork products have been brought into the United States and replaced domestic pork and pork products in normal channels of trade.

(b)(1) It is the purpose of this chapter to authorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research, and consumer information designed to –

(A) strengthen the position of the pork industry in the marketplace; and

(B) maintain, develop, and expand markets for pork and pork products.

(2) Such procedure shall be implemented, and such program shall be conducted, at no cost to the Federal Government.

(3) Nothing in this chapter may be construed to –

(A) permit or require the imposition of quality standards for pork or pork products;

(B) provide for control of the production of pork or pork products; or

(C) otherwise limit the right of an individual pork producer to produce pork and pork products.

---

7 U.S.C. § 4808. National Pork Board

(a)(1) The order shall provide for the establishment and appointment by the Secretary of a 15-member National Pork Board.

(2) The Board shall consist of producers representing at least 12 States and importers appointed by the Secretary from nominations submitted under section 4806(g) of this title.

(2) The Board shall consist of producers or importers appointed by the Secretary from nominations submitted under section 4806(g) of this title.

(3) A member of the Board shall serve for a 3-year term, with no such member serving more than two consecutive 3-year terms, except that initial appointments to the Board shall be staggered with an equal number of members appointed, to the maximum extent possible, to 1-year, 2-year, and 3-year terms, except that the term of a member of the Board shall continue until the successor of such member, if any, is appointed in accordance with paragraph (2).

(4) The Board shall select its President by a majority vote.

(5)(A) A majority of the members of the Board shall constitute a quorum at a meeting of the Board.

(B) A majority of votes cast at a meeting at which a quorum is present shall determine a motion or election.

(6) A member of the Board shall serve without compensation, but shall be reimbursed by the Board from assessments collected under section 4809 of this title for

reasonable expenses incurred in performing duties as a member of the Board.

(b)(1) The Board shall –

(A) develop, at the initiative of the Board or other person, proposals for promotion, research, and consumer information plans and projects;

(B) submit such plans and projects to the Secretary for approval;

(C) administer the order, in accordance with the order and this chapter;

(D) prescribe such rules as are necessary to carry out such order;

(E) receive, investigate, and report to the Secretary complaints of violations of such order;

(F) make recommendations to the Secretary with respect to amendments to such order; and

(G) employ a staff and conduct routine business.

(2) The Board shall prepare and submit to the Secretary, for the approval of the Secretary, a budget for each fiscal year of anticipated expenses and disbursements of the Board in the administration of the order, including the projected cost of –

(A) any promotion, research or consumer information plan or project to be conducted by the Board directly or by way of contract or agreement; and

(B) the budgets, plans, or projects for which State associations are to receive funds pursuant to section 4809(c)(1) of this title.

(3) No plan, project, or budget referred to in paragraph (1) or

(2) may become effective unless approved by the Secretary.

(4)(A) The Board, with the approval of the Secretary, may enter into contracts or agreements with a person for –

(i) the development and conduct of activities authorized under an order; and

(ii) the payment of the cost thereof with funds collected through assessments under such order.

(B) Such contract or agreement shall require that –

(i) the contracting party develop and submit to the Board a plan or project, together with a budget or budgets that include the estimated cost to be incurred under such plan or project;

(ii) such plan or project become effective on the approval of the Secretary; and

(iii) the contracting party –

(I) keep accurate records of all relevant transactions of the party;

(II) make periodic reports to the Board of –

(aa) relevant activities the party has conducted; and

(bb) an accounting for funds received and expended under such contract; and

(III) make such other reports as the Secretary or Board may require.

7 U.S.C. § 4809. Assessments

(a) Collection and remission to Board; persons required to pay

(1) The order shall provide that, not later than 30 days after the effective date of the order under section 4805(c) of this title an assessment shall be paid, in the manner prescribed in the order. Upon the appointment of the Board, the assessments held in escrow shall be distributed to the Board. Except as provided in paragraph (3), assessments shall be payable by –

(A) each producer for each porcine animal described in subparagraph (A) or (C) of section 4802(8) of this title produced in the United States that is sold or slaughtered for sale;

(B) each producer for each porcine animal described in subsection 4802(8)(B) of this title that is sold; and

(C) each importer for each porcine animal, pork, or pork product that is imported into the United States.

(2) Such assessment shall be collected and remitted to the Board once it is appointed pursuant to section 4808 of this title, but, until that time, to the Secretary, who shall promptly proceed to distribute the funds received by him in accordance with the provisions of subsection (c) of this section, except that the Secretary shall retain the funds to be received by the Board until such time as the Board is appointed pursuant to section 4808 of this title, by –

(A) in the case of subparagraph (A) of paragraph (1), the purchaser of the porcine animal referred to in such subparagraph;

(B) in the case of subparagraph (B) of paragraph (1), the producer of the porcine animal referred to in such subparagraph; and

(C) in the case of subparagraph (C) of paragraph (1), the importer referred to in such subparagraph.

(3) A person is not required to pay an assessment for a porcine animal, pork, or pork product under paragraph (1) if such person proves to the Board that an assessment was paid previously under such paragraph by a person for such porcine animal (of the same category described in subparagraph (A), (B), or (C) of section 4802(8) of this title), pork, or pork product.

(b) Rate of assessment; increase; waiver of collection of assessment

(1) Except as provided in paragraph (2), the rate of assessment prescribed by the initial order shall be the lesser of –

(A) 0.25 percent of the market value of the porcine animal, pork, or pork product sold or imported; or

(B) an amount established by the Secretary based on a recommendation of the Delegate Body.

(2) Except as provided in paragraph (3), the rate of assessment in the initial order may be increased by not more than 0.1 percent per year on recommendation of the Delegate Body.

(3) The rate of assessment may not exceed 0.50 percent of such market value unless –

(A) after the initial referendum required under section 4811(a) of this title, the Delegate Body

recommends an increase in such rate above 0.50 percent; and

(B) such increase is approved in a referendum conducted under section 4811(b) of this title.

(4)(A) Pork or pork products imported into the United States shall be assessed based on the equivalent value of the live porcine animal from which such pork or pork products were produced, as determined by the Secretary.

(B) The Secretary may waive the collection of assessments on a type of such imported pork or pork products if the Secretary determines that such collection is not practicable.

(c) Distribution and use

Funds collected by the Board from assessments collected under this section shall be distributed and used in the following manner:

(1)(A) Each State association, shall receive an amount of funds equal to the product obtained by multiplying –

(i) the aggregate amount of assessments attributable to porcine animals produced in such State by persons described in subsection (a)(1)(A) and (B) of this section minus that State's share of refunds determined pursuant to paragraph (4) by such persons pursuant to section 4813 of this title; and

(ii) a percentage applicable to such State association determined by the Delegate Body, but in no event less than sixteen and one-half percent, or

(B) in the case of a State association that was conducting a pork promotion program in the period from July 1, 1984, to June 30, 1985, if greater than (A) an amount of funds equal to the amount of funds that would have been collected in such State pursuant to the pork promotion program in existence in such State from July 1, 1984, to June 30, 1985, had the porcine animals, subject to assessment and to which no refund was received in such State in each year following December 23, 1985, been produced from July 1, 1984, to June 30, 1985, and been subject to the rates of assessments then in effect and the rate of return then in effect from each State to the Council described in paragraph (2)(A), and other national entities involved in pork promotion, research and consumer information.

(C) A State association shall use such funds and any proceeds from the investment of such funds for financing –

(i) promotion, research, and consumer information plans and projects, and

(ii) administrative expenses incurred in connection with such plans and projects.

(2)(A) The National Pork Producers Council, a nonprofit corporation of the type described in section 501(c)(3) of title 26 and incorporated in the State of Iowa, shall receive an amount of funds equal to –

(i) 37 1/2 percent of the aggregate amount of assessments collected under this section throughout the United States from the date assessment commences pursuant to subsection (a)(1) of this section until the first day of the month following the month in which the Board is appointed pursuant to section 4808 of this title.

(ii) 35 percent thereafter until the referendum is conducted pursuant to section 4811 of this title,

(iii) 25 percent until twelve months after the referendum is conducted, and

(iv) no funds thereafter except in so far as it obtains such funds from the Board pursuant to sections 4808 or 4809 of this title, each of which amounts determined under (i), (ii), and (iii) shall be less the Council's share of refunds determined pursuant to paragraph (4).

(B) The Council shall use such funds and proceeds from the investment of such funds for financing –

(i) promotion, research, and consumer information plans and projects, and

(ii) administrative expenses of the Council.

(3)(A) The Board shall receive the amount of funds that remain after the distribution required under paragraphs (1) and (2).

(B) The Board shall use such funds and any proceeds from the investment of such funds pursuant to subsection (g) of this section for –

(i) financing promotion, research, and consumer information plans and projects in accordance with this chapter;

(ii) such expenses for the administration, maintenance, and functioning of the Board as may be authorized by the Secretary;

(iii) accumulation of a reasonable reserve to permit an effective promotion, research, and consumer information program to continue in years when the amount of assessments may be reduced; and

(iv) administrative costs incurred by the Secretary to carry out this chapter, including any expenses incurred for the conduct of a referendum under this chapter.

(4)(A) Each State's share of refunds shall be determined by multiplying the aggregate amount of refunds received by producers in such State by the percentage applicable to such State pursuant to paragraph (1)(A)(ii).

(B) The National Pork Producers Council's share of refunds shall be determined by multiplying its applicable percent of the aggregate amount of assessments by the product of –

(i) subtracting from the aggregate amount of refunds received by all producers the aggregate amount of State share or refunds in every State determined pursuant to subparagraph (A), and

(ii) adding to that sum the aggregate amount of refunds received by importers.

(d) Prohibited promotions

No promotion funded with assessments collected under this chapter may make –

(1) a false or misleading claim on behalf of pork or a pork product; or

(2) a false or misleading statement with respect to an attribute or use of a competing product.

(e) Influencing legislation prohibited

No funds collected through assessments authorized by this section may, in any manner, be used for the purpose of influencing legislation, as defined in section 4911(d) and (e)(2) of title 26.

(f) Maintenance of books and records; audits

The Board shall –

(1) maintain such books and records, and prepare and submit to the Secretary such reports from time to time, as may be required by the Secretary for appropriate accounting of the receipt and disbursement of funds entrusted to the Board or a State association, as the case may be; and

(2) cause a complete audit report to be submitted to the Secretary at the end of each fiscal year.

(g) Investment by Board of funds collected

The Board, with the approval of the Secretary, may invest funds collected through assessments authorized under this section, pending disbursement for a plan or project, only in –

(1) an obligation of the United States, or of a State or political subdivision thereof;

(2) an interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System; or

(3) an obligation fully guaranteed as to principal and interest by the United States.

---

7 U.S.C. § 4812. Suspension and termination of orders

(a) Authority of Secretary

If after the initial referendum provided for in section 4811 (a) of this title the Secretary determines that an order, or a provision of the order, obstructs or does not tend to effectuate the declared policy of this chapter, the

Secretary shall terminate or suspend the operation of such order or provision.

(b) Referendum to terminate or suspend; eligible voters; requirements for approval; termination or suspension date; one referendum within 2-year period

(1)(A) Except as provided in paragraph (2), after the initial referendum provided for in section 4811(a) of this title, on the request of a number of persons equal to at least 15 percent of persons who have been producers and importers during a representative period, as determined by the Secretary, the Secretary shall conduct a referendum to determine whether the producers and importers favor the termination or suspension of the order.

(B) The Secretary shall –

(i) suspend or terminate collection of assessments under the order not later than 6 months after the date the Secretary determines that suspension or termination of the order is favored by a majority of the producers and importers voting in the referendum; and

(ii) terminate the order in an orderly manner as soon as practicable after the date of such determination.

(2) Except with respect to a referendum required to be conducted under section 4811 of this title, the Secretary shall not be required by paragraph (1) to conduct more than one referendum under this chapter in a 2-year period.

(c) Termination or suspension not to be considered an order

The termination or suspension of an order, or a provision of an order, shall not be considered an order within the meaning of this chapter.

APPENDIX D

EXCERPTS FROM 7 CFR PART 1230

7 C.F.R. § 1230.25 State association.

State association means the single organization of producers in a State that is organized under the laws of that State and is recognized by the chief executive officer of such State as representing such State's producers. If no such organization exists in a State as of January 1, 1986, the Secretary may recognize an organization that represents not fewer than 50 producers who market annually an aggregate of not less than 10 percent of the pounds of porcine animals marketed in such State. The Secretary may cease to recognize a State association and instead recognize another organization of producers in a State as that State's association if the Secretary determines either that a majority of the members of the existing State association are not producers or that a majority of the members of the other organization seeking recognition are producers and that such organization better represents the economic interests of producers.

---

7 C.F.R. § 1230.55 Vacancies.

(a) To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary shall appoint a successor for the unexpired term of such member from the most recent list of nominations made by the Delegate Body.

(b) If a member of the Board fails or refuses to perform the duties of a member of the Board, or if a member of the Board engages in acts of dishonesty or

willful misconduct, the Board may recommend to the Secretary that that member be removed from office. If the Secretary finds that the recommendation of the Board demonstrates adequate cause, the Secretary shall remove such member from office. A person appointed under this part or any employee of the Board may be removed by the Secretary if the Secretary determines that the person's continued service would be detrimental to the purposes of the Act.

---

7 C.F.R. § 1230.74 Prohibited use of distributed assessments.

(a) No funds collected under this subpart shall in any manner be used for the purpose of influencing legislation as that term is defined in section 4911 (d) and (e)(2) of the Internal Revenue Code of 1954, or for the purpose of influencing governmental policy or action except in recommending to the Secretary amendments to this part.

(b) Organizations receiving distributions of assessments from the Board shall furnish the Board with annual financial statements audited by a certified public accountant of all funds distributed to such organizations pursuant to this subpart and any other reports as may be required by the Secretary or the Board in order to verify the use of such funds.

---

7 C.F.R. §1230.85 Proceedings after termination

(a) Upon the termination of this subpart, the Board shall recommend not more than five of its members to the Secretary to serve as trustees for the purpose of liquidating

the affairs of the Board. Such persons, upon designation by the Secretary, shall become trustees of all the funds and property owned, in the possession of, or under the control of, the Board, including unpaid claims or property not delivered or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contract or agreement;

(3) From time to time account for all receipts and disbursements and deliver all property on hand together with all books and records of the Board and of the trustees, to such persons as the Secretary may direct; and

(4) Upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be used, to the extent practicable, in the interest of continuing one or more of the plans and projects authorized pursuant to this subpart.

---

7 C.F.R. § 1230.88 Patents, copyrights, inventions, and publications.

Any patents, copyrights, trademarks, inventions, or publications developed through the use of funds collected under the provisions of this subpart shall be the property of the United States Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, or publications inure to the benefit of the Board as income and be subject to the same fiscal, budget, and audit controls as other funds of the Board. Upon termination of this subpart, § 1230.85 shall apply to determine disposition of all such property.

---

7 C.F.R. § 1230.112 Rate of assessment.

In accordance with § 1230.71(d) the rate of assessment shall be 0.40 percent of market value.

(2) (2)

SUPREME COURT, U.S.
FILED
APR 19 2004
OFFICE OF THE CLERK

Nos. 03-1180 and 03-1043

IN THE

Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Petitioners,

v.

CAMPAIGN FOR FAMILY FARMS, ET AL.

MICHIGAN PORK PRODUCERS ASSOCIATION, INC., ET AL.,

Petitioners,

v.

CAMPAIGN FOR FAMILY FARMS, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Thomas C. Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Susan E. Stokes
Counsel of Record
David R. Moeller
Karen R. Krub
FARMERS' LEGAL ACTION GROUP, INC.
46 E. 4th Street, Suite 1301
St. Paul, MN 55101
(651) 223-5400

April 19, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

RULE 29.6 STATEMENT

The Campaign for Family Farms is an unincorporated association. No parent or publicly owned corporation owns 10 percent or more of the stock of the Campaign for Family Farms.

PARTIES TO THE PROCEEDINGS BELOW

The United States petitioners in this case are Ann Veneman, Secretary, United States Department of Agriculture, and the United States Department of Agriculture. The private petitioners include the Michigan Pork Producers Association, Inc., California Pork Producers Association, Kentucky Pork Producers Association, Indiana Pork Producers Association, New York Pork Producers Cooperative, Inc., Ohio Pork Producers Council, High Lean Pork, Inc., Pete Blauwiekel, and Bob Bloomer.

The respondents in this case are the Campaign for Family Farms, James Dale Joens, Richard Smith, Rhonda Perry, and Larry Ginter.

The National Pork Producers Council was a party in the proceedings below.

The United States's petition erroneously listed the Cattlemen's Beef Promotion and Research Board as a party to the proceeding in this case.

TABLE OF CONTENTS

RULE 29.6 STATEMENT i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
STATEMENT OF THE CASE 1
ARGUMENT 10
I. This Court Should Not Grant Certiorari Because the Ruling Below Was Correct 12
A. The Pork Checkoff Is Not Government Speech. 12
1. The Pork Checkoff Is a Private Self-Help Program 13
2. The Pork Checkoff Is Privately Funded. 14
3. The Government Exercises Only *Pro Forma* Oversight 17
4. There Is No Conflict Among the Circuits Regarding the Application of the Government Speech Doctrine to Commodity Checkoffs 18
B. The Pork Checkoff Is Unconstitutional Under Any Standard 18
1. *Central Hudson* Is Inapplicable. 19
2. Even If *Central Hudson* Applied, There Would Be No Basis to Sustain the Checkoff. 19
a. The Governmental Interest Is Not Substantial 20
b. The Pork Checkoff Does Not Directly Advance Any Asserted Governmental Interest 21

c. The Pork Checkoff Is Far More Extensive Than Necessary to Serve Any Asserted Governmental Interest..... 22

C. The Injunction Ordered by the District Court and Affirmed by the Sixth Circuit Is the Only Feasible Remedy. 23

1. The Injunction Cannot Be Limited to Respondents..... 23

2. The Injunction Cannot Be Limited to Promotional or Advertising Activities..... 25

II. This Court Should Deny Certiorari in Both the Present Case and in *Veneman v. LMA*, But If It Grants Certiorari in Either Case, It Should Grant It in Both..... 27

CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 16, 26
Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987) 25
American Mining Cong. v. U.S. Army Corps of Engineers, 962 F. Supp. 2 (D.D.C. 1997) 24
Blount v. Rizzi, 400 U.S. 410 (1971) 24
Board of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) 15
Bresgal v. Brock, 843 F.2d 1163 (9th Cir. 1987) 25
Califano v. Yamasaki, 442 U.S. 682 (1979) 24
Campaign for Family Farms v. Glickman, 200 F.3d 1180 (8th Cir. 2000) 4, 25
Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) ..... passim
Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984) 18
Cochran v. Veneman, 359 F.3d 263 (3d Cir. 2004) ..... passim
Cox v. New Hampshire, 312 U.S. 569 (1941) 16
Decker v. O'Donnell, 661 F.2d 598 (7th Cir. 1980) 24
Dimension Financial Corp. v. Board of Governors of the Fed. Res. Sys., 744 F.2d 1402 (10th Cir. 1984) 24
Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) ..... passim
Goetz v. Glickman, 525 U.S. 1102 (1999) 11
Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) 21
Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988) 16
Keller v. State Bar of Cal., 496 U.S. 1 (1990) ..... passim
Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 14

Livestock Marketing Ass'n v. United States Department of Agriculture, 207 F. Supp. 2d 992 (N.D.S.D. 2002) 21, 28

Livestock Marketing Ass'n v. United States Department of Agriculture, 335 F.3d 711 (8th Cir. 2003), *petitions for cert. filed* (Feb. 13, 2004) (Nos. 03-1164 and 03-1165) 1, 11, 14, 20

Michigan Pork Producers Ass'n v. Campaign for Family Farms, 174 F. Supp. 2d 637 (W.D. Mich. 2001) 4, 5

Pelts & Skins, LLC v. Landreneau, No. 03-30523, 2004 U.S. App. LEXIS 6364 (5th Cir. Apr. 2, 2004) passim

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) 15

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 22

Rust v. Sullivan, 500 U.S. 173 (1991) 15

United States v. Frame, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) 18

United States v. Sperry Corp., 493 U.S. 52 (1989) 16

United States v. United Foods, Inc., 533 U.S. 405 (2001) ..... passim

Veneman v. Livestock Marketing Ass'n, No. 03-1164 (filed Feb. 13, 2004) 10

Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988) 24

Constitutional Provisions

U.S. Const. amend. I 1

Statutes

7 U.S.C. § 4801 ..... 1, 13

7 U.S.C. § 4801(b)(1) 25

7 U.S.C. § 4801(b)(2) 14, 15

7 U.S.C. § 4801(b)(3) 14
7 U.S.C. § 4802(2) 26
7 U.S.C. § 4808(a)(1)(6) 13
7 U.S.C. § 4808(b)(1) 13
7 U.S.C. § 7401(b)(8) 13
7 U.S.C. § 4819 13

Rules

S. Ct. R. 10 12
S. Ct. R. 10(a) 11

Regulations

7 C.F.R. § 1230.71 24
7 C.F.R. § 1230.73(c)(4) 16
7 C.F.R. § 759.1 23

Legislative Materials

131 Cong. Rec. S16,090 (1985) 13
H.R. Rep. No. 99-271, 99th Cong., 1st Sess. 190 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103 13
S. Rep. No. 99-145, 99th Cong., 1st Sess. 331 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1676 13

Other Authorities

Agricultural Marketing Services News Release, *USDA Approves Mushroom Program Assessment Reduction*, No. 176-01 (Aug. 3, 2001), *available at* http://www.ams.usda.gov/news/176-01.htm 28
Agricultural Marketing Services News Release, *USDA Approves Mushroom Program Assessment Increase*, No. 281-02 (Nov. 6, 2002), *available at* http://www.ams.usda.gov/news/281-02.htm 28

Agricultural Marketing Services News Release, *USDA Approves Mushroom Program Assessment Increase*, No. 291-01 (Dec. 4, 2001), *available at* http://www.ams.usda.gov/news/291-01.htm 28

Geoffrey S. Becker, *Hog Prices: Questions and Answers*, Congressional Research Service (updated Dec. 15, 1999), *at* http://www.ncseonline.org/NLE/CRSreports/Agriculture/ag-68.cfm 3

Joseph W. Luter, III, *To Our Shareholders*, Smithfield Foods, Inc., 2000 Annual Report (July 7, 2000), *available at* http://www.smithfieldfoods.com/Investor/pdf/sfd_ar00.pdf 3

Neil E. Harl, *The Structural Transformation of Agriculture* (Mar. 20, 2003), *available at* http://www.econ.iastate.edu/faculty/harl/StructuralTransformationofAg.pdf 3

Rod Smith, *'Clear Picture' Emerging for Pork Producers; Choices and Opportunities Ahead Are 'Staggering,'* Feedstuffs, Vol. 70, No. 44, Oct. 26, 1998 4

USDA Grain Inspection, Packers and Stockyards Administration, *Assessment of the Cattle and Hog Industries Calendar Year 2001* (June 2002), *available at* http://www.usda.gov/gipsa/pubs/01assessment/01assessment.pdf 3

Written Testimony of the Organization for Competitive Markets presented to the U.S. Senate Judiciary Comm., Subcomm. on Antitrust, Competition Policy and Consumer Rights (July 23, 2003), *available at* http://competitivemarkets.com/news_and_events/press_releases/2003/7-23.htm 3

STATEMENT OF THE CASE

In the three years since this Court's decision in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the courts of appeals have all reached the same conclusion: mandatory agricultural assessment programs violate the First Amendment of the U.S. Constitution. The Sixth Circuit's decision in this case striking down the Pork Promotion, Research, and Consumer Act, 7 U.S.C. § 4801 *et seq.* (the "pork checkoff" or "Pork Act"), is entirely consistent with the recent decisions of the Third, Fifth, and Eighth Circuits regarding other checkoff programs. *Livestock Marketing Ass'n v. United States Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003), *petitions for cert. filed* (Feb. 13, 2004) (Nos. 03-1164 and 03-1165) ("*LMA*") (beef checkoff); *see also Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004) (dairy checkoff); *Pelts & Skins, LLC v. Landreneau*, No. 03-30523, 2004 U.S. App. LEXIS 6364 (5th Cir. Apr. 2, 2004) (Louisiana alligator checkoff).

The United States and private petitioners[1] argue that this Court should revisit the constitutionality of checkoff programs, since *United Foods* did not consider the claim that these programs are somehow immune from First Amendment scrutiny because they involve "government speech." But that claim has been squarely rejected by all four courts of appeals that have considered checkoff programs. *See* Appendix to the U.S. Petition for Certiorari ("U.S. Pet. App.") 8a; *LMA*, 335 F.3d at 720; *Cochran*, 359 F.3d at 268; *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *15. Thus, petitioners have

---

[1] Two petitions for certiorari have been filed in this case. For ease of reference, we refer to the petitioners in No. 03-1180 as "the United States" and to the petitioners in No. 03-1043 as "the private petitioners." Respondents address herein facts that bear on issues that would properly be before this Court if certiorari were granted, but do not address the array of inflammatory and sometimes false statements of facts asserted by the private petitioners.

presented no compelling reason for this Court to grant certiorari in either of the now-pending cases. If, however, the Court decides to hear either case, it should hear both in order to resolve the constitutionality of these programs once and for all.

1. Respondents are the Campaign for Family Farms (CFF) – a coalition of family farm organizations with hundreds of hog farmer members – and four individual hog farmers. CFF's mission is to ensure the continued existence of family farms in the face of increasing industrialization of agriculture.[2] U.S. Pet. App. 14a, 18a. Respondents oppose the mandatory pork checkoff because its objectionable ideological speech is aligned with policies that have had a devastating economic effect on family farms and the rural communities they support. *Id.* 18a.

2. The Norman Rockwell image of rural America is rapidly disappearing as the number of farms shrinks, the size of farms grows, and ownership and management of agricultural operations is consolidated in the hands of a shrinking number of individuals and corporations.[3] Those farmers who do raise hogs are increasingly raising them not as independent producers, but on behalf of others, usually a

---

[2] CFF filed an *amicus* brief with this Court in *United Foods* urging affirmance of the Sixth Circuit's ruling.

[3] USDA statistics show the steady exit of independent hog farmers from the hog industry over the past twenty years. C.A. App. 822. In the mid-1980s, prior to the enactment of the pork checkoff, there were approximately 500,000 hog farms in the nation. As of year-end 2002, that number had shrunk to 75,350 hog operations. *Id.* 1194, C.A. Addendum 1. While the number of hog farms has declined, the total number of hogs produced has remained relatively stable, resulting in increasingly large hog operations. *See* William D. McBride & Nigel Key, *Economic and Structural Relationships in U.S. Hog Production—Agricultural Economic Report No. 818*, at 5 (Feb. 2003), *available at* http://www.ers.usda.gov/publications/aer818/aer818.pdf.

packer or packer affiliate.[4] Combined with this increasing vertical integration in hog production is continued corporate consolidation of processing capacity.[5] Independent hog farmers are being left without a competitive market in which to sell their hogs, driving them out of business or into unfavorable contracts with packers. *See, e.g.*, Neil E. Harl, *The Structural Transformation of Agriculture* 4-5 (Mar. 20, 2003), *available at* http://www.econ.iastate.edu/faculty/harl/StructuralTransformationofAg.pdf.

The hog industry reached a watershed moment at the end of 1998 and beginning of 1999, when hog prices hit record lows and hog farmers could not break even.[6] Geoffrey S. Becker, *Hog Prices: Questions and Answers*, Congressional Research Service (updated Dec. 15, 1999), *at* http://www.ncseonline.org/NLE/CRSreports/Agriculture/ag-68.cfm. During this crisis, more than 15,000 hog farmers quit producing hogs. USDA National Agricultural Statistics Service, *Hogs and Pigs Report* 21 (Dec. 28, 1999), *at*

---

[4] A 2002 National Pork Board (NPB) study showed that more than 83% of hogs at that time were committed to packers before slaughter through packer ownership or contractual arrangements, up from 38% in 1994. C.A. App. 1248.

[5] In 2000, four firms controlled 56% of the nation's hog processing industry. USDA Grain Inspection, Packers and Stockyards Administration, *Assessment of the Cattle and Hog Industries Calendar Year 2001*, at 18, 38 (June 2002), *available at* http://www.usda.gov/gipsa/pubs/01assessment/01assessment.pdf. Smithfield, the nation's largest processor, recently acquired Farmland Industries, which only increased the consolidation of processing power. *See, e.g.*, Written Testimony of the Organization for Competitive Markets presented to the U.S. Senate Judiciary Comm., Subcomm. on Antitrust, Competition Policy and Consumer Rights (July 23, 2003), *at* http://judiciary.senate.gov/testimony.cfm?id=869&wit_id=2452.

[6] While hog prices were at record lows, retail pork prices did not decline accordingly and processors like Smithfield posted near-record profits. *See* Joseph W. Luter, III, *To Our Shareholders*, Smithfield Foods, Inc., 2000 Annual Report 3 (July 7, 2000), *available at* http://www.smithfieldfoods.com/Investor/pdf/sfd_ar00.pdf.

http://usda.mannlib.cornell.edu/reports/nassr/livestock/phpbb/1999/hgpg1299.pdf.

Throughout this period of consolidation and record low prices, a private commodity group, the National Pork Producers Council (NPPC), acted as the general contractor for the $50 million annual pork checkoff. Many hog farmers, including respondents, sharply disagreed with being associated with the tactics and policies pursued by NPPC. For example, in response to the 1998 hog crisis, NPPC's CEO told producers to expand and seize the market share left by the hog farmers being driven out by the record low hog prices. Rod Smith, *'Clear Picture' Emerging for Pork Producers; Choices and Opportunities Ahead Are 'Staggering,'* Feedstuffs, Vol. 70, No. 44 at 23, Oct. 26, 1998. This comment, seen by many as reflecting NPPC's alignment with industrialized agriculture, drove thousands of hog farmers to sign petitions calling for a referendum to terminate the checkoff program.

3. The origins of this case stem from respondents' collection and submission to USDA of those petitions.[7] Based on the petitions, Agriculture Secretary Glickman ordered a referendum that was held in August and September 2000. *See Michigan Pork Producers Ass'n v. Campaign for Family Farms*, 174 F. Supp. 2d 637, 639 (W.D. Mich. 2001) ("*MPPA*"). On January 11, 2001, Secretary Glickman announced that "15,951 producers disfavored the Program and 14,396 producers favored the Program," and issued an order terminating the checkoff. U.S. Pet. App. 17a. Private petitioners and NPPC filed suit, challenging both the counting of the votes and the legal basis for terminating the program.

---

[7] NPPC attempted to obtain the names and addresses of the hog farmers who had signed the referendum petitions through a Freedom of Information Act request. CFF filed suit against USDA to block release of the information, and the Eighth Circuit ordered a permanent injunction to protect the hog farmers' privacy. *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000).

Respondents intervened in support of the referendum and termination decisions. In February 2001, newly appointed Agriculture Secretary Veneman reversed Secretary Glickman's decision to terminate the pork checkoff. *MPPA*, 174 F. Supp. 2d at 639. Secretary Veneman settled the suit with the private petitioners through an agreement to continue the pork checkoff, albeit with a change in how it would be administered. U.S. Pet. App. 17a. Respondents then filed cross-claims against USDA.

In December 2001, the district court upheld Secretary Veneman's decision to continue the pork checkoff as within her discretion. *MPPA*, 174 F. Supp. 2d at 648. After *United Foods*, respondents added cross-claims alleging violations of their First Amendment rights of freedom of speech and association.

4. On October 25, 2002, the United States District Court for the Western District of Michigan granted respondents' motion for summary judgment on their constitutional claims, holding that the pork checkoff, like the mushroom checkoff, was "unconstitutional and rotten," and violated respondents' First Amendment rights of free speech and association. U.S. Pet. App. 55a. The district court then enjoined operation of the pork checkoff. *Id.* 53a. In response to the petitioners' argument that the program was immune from First Amendment scrutiny under the "government speech" doctrine, the district court held that the program was not in fact government speech; rather, it was "a self-help program for pork producers." *Id.* 47a. The district court acknowledged the Secretary's participation in the workings of the National Pork Board (NPB), but determined that "this involvement does not translate the advertising and marketing in question into 'government speech' as the federal courts have interpreted that term. You cannot make a silk purse from a sow's ear. This defense fails as a matter of law." *Id.*

The district court recognized that respondents and the hog farmers they represent have "sincere philosophical, political

and commercial" objections to the mandatory pork checkoff. *Id.* 50a. The court noted the "frustration" of independent farmers who object to all aspects of the pork checkoff because it supports a system of agriculture that is anathema to their core beliefs about what agriculture is and should be. *Id.* 51a. Put simply, respondents object to paying to support a system they believe is driving them out of existence. *See id.* 18a-19a.

Furthermore, the district court acknowledged that respondents have clearly and consistently articulated their economic and ideological objections to every aspect of the pork checkoff, including the generic promotion of pork. First, generic advertising fails to distinguish the unique qualities and attributes of hogs raised by independent family farmers. *Id.* 19a. Second, generic advertising promotes an industrialized method of production that respondents oppose. The "Pork. The Other White Meat" slogan is intended to create a demand for lean pork that comes from hogs raised in what respondents believe are unhealthy and inhumane conditions. *Id.* Third, generic advertising promotes a product respondents do not sell. Hog farmers sell hogs, not pork. Packers and retailers sell pork. *Id.* Fourth, because the checkoff promotes a product they do not sell, respondents do not benefit from it. *Id.*

Moreover, the district court validated respondents' objections to other aspects of checkoff promotion campaigns. In addition to generic advertising, the checkoff has also funded "branded advertising," which promotes the products of particular packers and retailers. *Id.* 20a. Because packers own their own hogs in growing numbers, through checkoff-funded branded advertising hog farmers are in fact forced to pay for the advertising of their direct competitors. *Id.*[8] The packers whose advertising budgets are being subsidized by hog farmers are also direct competitors of hog farmers such as

---

[8] One checkoff-funded "branded" radio ad promoting Hormel pork ran in Colorado, where Hormel owns 25,000 sows. C.A. App. 439, 494-97.

respondents Joens and Perry, who have joined with other hog farmers to slaughter their own hogs and market their pork. *Id.*

Respondents' objections to the other aspects of the pork checkoff – the "research" and "consumer information" portions – are equally ardent. They believe the "information" made available to consumers promotes and encourages consumers to participate in a system respondents abhor. For example, respondent Jim Joens objects to the pork checkoff's consumer information projects on "animal welfare":

> I raise my hogs using humane methods; they are not confined in pens their entire lives, as they are in many factory hog farms. I object to my checkoff dollars being used to publish information that helps cover up the abuses of those large corporate confinement facilities.

Id. Respondent Richard Smith similarly objects to being compelled to pay for "education" of producers:

> These programs are for people that work in the corporate hog factories that have never seen a hog before they went to work for a huge conglomerate. I object because this is independent producer money going to a program that is focused on corporate hog factories and not the independent producers who believe in animal husbandry and who have been handling hogs humanely for years. I don't believe in giving shots unless we have to. If a hog is sick then I vaccinate it or give it a shot and so I think we have a cleaner hog. These programs are for the education of factory producers.

Id. 20a-21a.

As highlighted by the district court, the research funded by the pork checkoff is just as ideologically abhorrent to independent hog farmers. A primary focus of checkoff-funded research is in the area of what the checkoff terms "Antimicrobial Resistance and Alternatives Research," meaning the continuous feeding of subtherapeutic levels of

antibiotics to hogs to promote growth and prevent disease. *See id.* 21a; National Pork Board, *Pork Checkoff Report*, Vol. 22 No. 1, 10-13 (Winter 2003), *available at* http://www.porkboard.org/docs/porkcheckoffQtr12003.pdf. Respondent Rhonda Perry, like many independent hog farmers, opposes this practice and strongly objects to funding and being associated with this research and the industrialized method of agriculture it promotes through checkoff communications:

> I object to NPB using my checkoff dollars to convince the public and policymakers that the pork industry as a whole is looking out for the health of the general public. Subtherapeutic antibiotic usage has become general industry practice in factory farm production. Many people are increasingly aware of the problems being created by these practices. That is why we have standards for Patchwork Family Farms [the entity through which she processes and markets her hogs] that limit the use of antibiotics. It appears to me as though checkoff dollars are being used to "convince" people that constant feeding of subtherapeutic antibiotics is not a significant problem or at least to fund research to show that it isn't a problem.

See U.S. Pet. App. 21a; C.A. App. 159.

Finally, the district court rejected petitioners' arguments that the remedy should be applied only to respondents, ruling that so limiting the injunction would "essentially re-write the Act in a manner inconsistent with judicial interpretation," since the Pork Act does not allow voluntary participation. *Id.* 52a-53a. The district court declared the Pork Act unconstitutional and enjoined the collection of assessments and the operation of the pork checkoff. *Id.* 53a.

5. Petitioners appealed. The Sixth Circuit initially stayed the injunction, and then affirmed the district court. *Id.* 12a. The court of appeals determined that the Pork Act "is nearly identical in purpose, structure, and implementation to the

Mushroom Act." *Id.* 10a. Like the other courts of appeals that have considered checkoff programs, the Sixth Circuit followed this Court's clear precedent in *United Foods* and ruled the Pork Act unconstitutional.

Addressing the principal issue left open by this Court in *United Foods*, the Sixth Circuit affirmed the district court's ruling that the pork checkoff cannot be saved by the government speech doctrine, given the "pork industry's extensive control" over the program. *Id.* 8a. The court of appeals based its ruling on several factors. First, it found that the primary purpose of the Pork Act is to market pork and strengthen the pork industry. *Id.* Second, the court of appeals found that the program is funded not by general tax revenues, but rather from mandatory assessments paid by pork producers. The court of appeals noted that not only does the Pork Act prohibit the use of government funds for the checkoff, but the Secretary and her staff are actually reimbursed from the assessments for any time or expenses related to the program. *Id.* Third, the Sixth Circuit found that the government's oversight of the checkoff is limited, concluding:

> In sum, the costs and content of the speech in question are almost completely the responsibility of members of the pork industry. The First Amendment does not lie dormant merely because the government acts to consolidate and facilitate speech that is otherwise wholly private.

Id. 9a.

The Sixth Circuit rejected petitioners' attempt to distinguish this case from *United Foods* by claiming that most of the funds collected under the Mushroom Act were used for generic advertising, while only a small percentage of the pork checkoff funds were so used. The record showed that at least fifty-one percent of the 2001 budget was listed under the category of "Demand Enhancement," which includes many forms of promotion. *Id.* 11a. Moreover, the Sixth Circuit

affirmed the district court's finding that the pork checkoff-funded programs for "education" and "research" "were designed to further the Act's promotional goals." *Id.* 12a. Accordingly, the court of appeals concluded that "the Pork Act serves but one purpose: promotion." *Id.* Thus, compelled assessments are unconstitutional under *United Foods*.

Finally, the Sixth Circuit also rejected the argument (preserved by the United States in a single footnote in its appellate brief) that the case should be analyzed under the test for restrictions on commercial speech set forth in this Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). U.S. Pet. App. 12a. The court of appeals distinguished this case from cases governed by *Central Hudson* because "[t]he Pork Act does not directly limit the ability of pork producers to express a message; it *compels* them to express a message with which they do not agree." *Id.* (emphasis added). *Central Hudson* has never been applied to a case involving compelled speech. *Id.* (citing *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 474 n.18 (1997)). The court noted: "It is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece." *Id.*

6. The Solicitor General has filed petitions for certiorari in this case and in a parallel case in which the Eighth Circuit declared the beef checkoff unconstitutional. *Veneman v. Livestock Marketing Ass'n*, No. 03-1164 (filed Feb. 13, 2004). This Court should deny certiorari in both cases, but if it grants certiorari in either case, it should grant the government's petition in both cases and set them for oral argument together.

ARGUMENT

The petition for a writ of certiorari should be denied. Petitioners ask this Court to grant certiorari on an issue on which there is no conflict among the federal courts of appeals. Following this Court's decision in *United Foods*, four courts of appeals have found an array of checkoff programs

unconstitutional. *See* U.S. Pet. App. 14a (6th Cir. 2003) (pork checkoff); *LMA*, 335 F.3d 711 (8th Cir. 2003) (beef checkoff); *Cochran*, 359 F.3d 263 (3d Cir. 2004) (dairy checkoff); *Pelts & Skins*, 2004 U.S. App. LEXIS 6364 (5th Cir. 2004) (Louisiana alligator checkoff). Each of those courts considered and unequivocally rejected the government speech argument raised by petitioners here. No court of appeals has come to a contrary conclusion. There being no conflict among the circuits, there is no compelling reason for this Court to grant the petitions. *See* S. Ct. R. 10(a).

That there remain issues not addressed by this Court relating to these commodity promotion programs is due entirely to the government's choice of litigation tactics. In the two commodity promotion cases this Court has already decided, the government either waived the government speech argument, *Wileman Bros.*, 521 U.S. at 482 n.2, or failed to raise it in the court of appeals, *United Foods*, 533 U.S. at 416-17. As to the government's newfound argument that these compelled speech cases should be governed by *Central Hudson* (*see* U.S. Pet. 19 n.3), the government has twice declared to this Court that *Central Hudson* should *not* apply to such programs. *See* C.A. App. 1341-42 (arguing in *United Foods* that "the *Central Hudson* test, which involves a restriction on commercial speech. should [not] govern a case involving the compelled funding of speech") (brackets in original); U.S. Br. 14-15, *Goetz v. Glickman*, 525 U.S. 1102 (1999) (No. 98-607) (asserting: "As the Court made clear in *Wileman Bros.*, *Central Hudson*, a case involving a *restriction* on commercial speech, is inapplicable in cases, such as this one, involving *compelled funding* of commercial speech.") (emphasis in original). In the instant case, the United States did not even argue to the Sixth Circuit that *Central Hudson* should be applied; it simply preserved the argument in a footnote in its brief. U.S. C.A. Br. n.3. The government should not be permitted to burden this Court by creating a moving target, raising and waiving issues without end.

Petitioners' arguments for review are also inappropriate because they largely seek review of factual, rather than legal conclusions. *See* S. Ct. R. 10. In arguing that the lower courts were wrong in not applying the government speech doctrine, petitioners primarily take issue with the district court and court of appeals' characterizations of how the program operates in fact. *See, e.g.*, U.S. Pet. 13-15. Such asserted errors do not warrant this Court's review.

If, however, this Court grants certiorari in either this case or *LMA*, it should grant it in both cases. The federal and state governments have enacted a number of commodity checkoff programs of this type; thus far, review of these programs has been conducted on a case-by-case basis with the United States often taking fundamentally inconsistent positions in different cases. This Court's consideration of how such programs operate across different factual contexts will assure a widely applicable final resolution of the First Amendment questions they present.

I. This Court Should Not Grant Certiorari Because the Ruling Below Was Correct.

The Sixth Circuit's holding is compelled by this Court's decision in *United Foods*. None of the arguments raised by petitioners – that the program is immune from First Amendment scrutiny because it is government speech, that the claims should be governed by the more relaxed standard set forth by this Court in *Central Hudson*, or that the injunction is overly broad – warrants Supreme Court review. Because the mandatory assessments under these checkoff programs are just as unconstitutional now as they were in June 2001 when this Court decided *United Foods*, the petitions for certiorari should be denied.

A. The Pork Checkoff Is Not Government Speech.

The Sixth Circuit's holding that the pork checkoff cannot be sustained under the government speech doctrine is both correct and consistent with the holdings of its sister circuits

and this Court's rulings. Because there is no conflict among the circuits or with any decision of this Court, petitioners demonstrate no compelling reason for this Court to grant certiorari on this issue.

1. The Pork Checkoff Is a Private Self-Help Program.

The pork checkoff was enacted in 1995 as a stand-alone industry "self-help" program, along with several other such programs. U.S. Pet. App. 47a; S. Rep. No. 99-145, 99th Cong., 1st Sess. 331 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1676, 1997; H.R. Rep. No. 99-271, 99th Cong., 1st Sess. 190 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1294; 131 Cong. Rec. S16,090 (1985); C.A. App. 2203, 2237; 7 U.S.C. §§ 4801-4819. Congress itself has stated that commodity promotion programs, such as the pork checkoff and the beef checkoff, are intended to be "'self-help' mechanisms for producers and processors to fund generic promotions for covered commodities." 7 U.S.C. § 7401(b)(8). Throughout the pork checkoff's existence, all checkoff-funded communications have told producers and the world that the checkoff is run by and for producers. *See, e.g.*, C.A. App. 2200, 2237. Checkoff ads proclaim that they are brought to you by "America's Pork Producers." *Id.* 724.

The pork checkoff is run entirely by private pork producers, not the government. The Pork Act itself endows NPB, not the government, with the powers and duties of developing checkoff-funded projects. 7 U.S.C. § 4808(b)(1). NPB members are not considered government employees, C.A. App. 1367, and they are reimbursed for their expenses from the collected assessments. 7 U.S.C. § 4808(a)(1)(6). NPB's Executive Vice President admitted that NPB "is not to be considered as a governmental entity/agency or a government contractor." U.S. Pet. App. 3a-4a.[9]

---

[9] Private state pork associations receive approximately 20% of all checkoff assessments. 7 U.S.C. § 4809(c)(1); *id.* § 4806(g). The Secretary

The Pork Act specifically prohibits government regulation of the pork industry. It prohibits the imposition of quality standards and control of production of pork or pork products. 7 U.S.C. § 4801(b)(3).

Nothing in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), suggests that NPB is a government agency. In *Lebron*, this Court found that Amtrak (which is subsidized with government funds) is an agency of the government for purposes of analyzing whether it had restrained an individual's speech in violation of the First Amendment. *Id.* at 394. That decision explicitly did not extend to the issue of whether an entity is a government agency for purposes of creating a "privilege" of the government. *Id.* at 399.

The fact that checkoff programs were enacted to help the private industries they promote has been a significant factor in each of the decisions of the courts of appeal declaring the various checkoff programs unconstitutional. *See* U.S. Pet. App. 8a-9a (pork); *Cochran*, 359 F.3d at 270-71 (dairy); *LMA*, 335 F.3d at 725-26 (beef); *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *22 (Louisiana alligator checkoff). In light of these clear rulings, there is no good reason for this Court to grant certiorari on this issue.

2. The Pork Checkoff Is Privately Funded.

The Sixth Circuit also held that pork checkoff-funded speech cannot be government speech because the pork checkoff must be conducted "at no cost to the Federal Government." U.S. Pet. App. 4a (quoting 7 U.S.C. § 4801(b)(2)). That holding follows the guidance this Court has provided on government speech which shows that, to be considered government speech, the speech in question must, at a minimum, be funded by the government. In *Keller v.*

---

has no role in appointing or approving the leadership of the state associations. 7 U.S.C. § 4802(16); 7 C.F.R. § 1230.25.

State Bar of California, 496 U.S. 1 (1990), this Court rejected application of the "so-called government speech doctrine," in part because the bar association was funded by dues paid by members of the bar and not appropriations from the legislature. *Id.* at 10-11.

Statements in this Court's other cases likewise support the Sixth Circuit's holding that the underpinning of the government speech doctrine is government funding. In *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000), the Court indicated that for government speech analysis to apply, one prerequisite would be that the speech be "financed by tuition dollars" rather than through the compelled student activity fee. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 833 (1995), the Court's dicta regarding government speech plainly referred only to instances "[w]hen the government disburses public funds."

In cases where this Court *has* found that an activity involves government speech, the speech in question was unquestionably funded with government expenditures. In *Rust v. Sullivan*, 500 U.S. 173 (1991), for example, this Court upheld regulations that restricted what doctors who worked for Title X-funded programs could say about abortions while performing work for those government-funded programs. *Id.* at 193; *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998) (upholding regulations concerning criteria for federal grant recipients).

The consistent teaching of these cases is that the government is free to speak its own message when it funds that message itself. The Sixth Circuit thus was correct in rejecting petitioners' argument that the pork checkoff is immune from First Amendment scrutiny as government speech, since the program's funding does not and cannot come from general tax revenues. U.S. Pet. App. 8a; 7 U.S.C. § 4801(b)(2). Indeed, the government must be reimbursed

from checkoff funds for any oversight it provides. U.S. Pet. App. 8a; 7 C.F.R. § 1230.73(c)(4).

The United States makes the incorrect and misleading assertion that the pork checkoff is merely a type of modest "user fee," U.S. Pet. 11, imposed on those who have "chosen" to be hog farmers, *id.* 10. That argument is without merit for two reasons. First, payers of "user fees" are volunteers: they choose, for example, to visit a national park or to use a particular service for which they are charged a fee. But, like the public employees in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and the lawyers in *Keller*, the mandatory assessments of the pork checkoff are imposed on hog farmers as a condition of earning their livelihood. Second, payers of "user fees" get something in return for the fee, such as a service, and the fee generally is germane to a legitimate non-speech activity. The only thing hog farmers receive in return for the mandatory pork checkoff is objectionable speech. In all of the cases cited by the United States for the novel argument that the pork checkoff assessments are a form of "user fees," the "fees" were actually a reimbursement to the government to cover its administrative expenses. *See United States v. Sperry Corp.*, 493 U.S. 52 (1989) (involving a "user fee" reimbursing the government for administrative expenses incurred in connection with the Iran-United States Claims Tribunal); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988) (considering whether school boards could require students who use bus service to pay for that bus service); *Cox v. New Hampshire*, 312 U.S. 569, 570-71 (1941) (upholding local government's imposition of a reasonable fee to compensate for administrative and law-enforcement expenses, noting the fee was "not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed"). The pork checkoff, by contrast, is not imposed to cover administrative expenses pertaining to a government function;

rather, the money goes into the coffers of private organizations and pays for their highly objectionable speech.

3. The Government Exercises Only *Pro Forma* Oversight.

One of the reasons this Court did not address the issue of whether checkoff-funded speech is government speech in *United Foods* was that, by failing to raise the argument sooner, the government had "deprived respondent of the ability to address significant matters that might have been difficult points for the government," such as whether the Secretary's approval of the advertising was "*pro forma*." 533 U.S. at 416-17. Addressing that exact issue, the Third, Fifth, and Sixth Circuits all found that the respective checkoff programs at issue lacked sufficient USDA oversight to be considered government speech. *See* U.S. Pet. App. 8a; *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *20; *Cochran*, 359 F.3d at 274.

To the extent that petitioners challenge the Sixth Circuit's decision that the government exercises only "limited oversight" over the pork checkoff programs, U.S. Pet. App. 9a, they seek factual, rather than legal review. The court of appeals based its conclusion on the following facts: 1) USDA has only one staff member to perform all pork checkoff-related duties; 2) the government does not draft or propose any of the advertisements funded by the pork checkoff; 3) the trademark for "Pork. The Other White Meat" is owned by a private organization, not the government; and 4) NPB is comprised of private pork producers, who are nominated by state pork associations, which are entirely private and not appointed by the Secretary. *Id.* The Sixth Circuit concluded that "the pork industry's extensive control over the Pork Act's promotional activities prevents their attribution to the government." *Id.* 8a; *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *20.

4. There Is No Conflict Among the Circuits Regarding the Application of the Government Speech Doctrine to Commodity Checkoffs.

The United States's argument that this Court should grant certiorari because the courts of appeal "did not rely on any consistent rationale" misses the point that those courts all reached the same result: the checkoffs cannot be sustained under the government speech doctrine. *See Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his court reviews judgments, not opinions."). Moreover, the United States's reliance on the Third Circuit's statement from 1989 that "the issue [is] a close one" and there are "sound reasons for concluding that the expressive activities financed by the Beef Promotion Act constitute 'government speech,'" U.S. Pet. 16 (citing *United States v. Frame*, 885 F.2d 1119, 1131-32 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990)), is no longer warranted. On February 24, 2004, the Third Circuit affirmed the conclusion in *Frame* that checkoff-funded speech is subject to First Amendment scrutiny. *Cochran*, 359 F.3d at 274.

B. The Pork Checkoff Is Unconstitutional Under Any Standard.

The refusal of the court of appeals to apply *Central Hudson* to this compelled speech case is not a basis for granting certiorari. First, the ruling is correct; as the government itself has recognized, *Central Hudson* is not the applicable test in a compelled speech case. *See supra* at 12. Second, even if *Central Hudson* were applicable, the pork checkoff would be unconstitutional. This Court said as much in *United Foods* when, in discussing whether or not the *Central Hudson* test was applicable, it stated: "We need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* [*v. Wileman Bros.*] or our other precedents to sustain the compelled assessments sought in this case." 533

U.S. at 410. This Court need not grant certiorari to address a legal issue of negligible effect.

1. *Central Hudson* Is Inapplicable.

The Sixth Circuit correctly ruled that *Central Hudson* does not apply to a case involving compelled speech. As this Court stated in *Wileman Bros.*, courts should *not* "rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising." 521 U.S. at 474. The Court further noted: "The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech." *Id.* at 474 n.18.

Moreover, the more lenient standard of analysis set forth in *Central Hudson* applies only to commercial speech, which is defined as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. The speech at issue here does not fall into this narrow category. The district court characterized the hog farmers' objections as "sincere *philosophical, political* and commercial disagreements," likening them to the objecting bar members in *Keller*. U.S. Pet. App. 50a (emphasis added). Thus, even if *Central Hudson* were applicable to compelled speech concerning "solely . . . economic interests," it would nevertheless be inapposite here.

2. Even If Central Hudson Applied, There Would Be No Basis to Sustain the Checkoff.

Even if the *Central Hudson* test does apply, the pork checkoff cannot pass muster. *Central Hudson* holds that the government may regulate commercial speech only if: (1) "the asserted governmental interest is substantial," (2) "the regulation directly advances the governmental interest asserted," and (3) the regulation "is not more extensive than is necessary to serve that interest." 447 U.S. at 566. The three circuit courts that examined the government's purported

interest in the stand-alone checkoff programs have agreed that it is not sufficiently substantial to justify the infringement on producers' First Amendment rights. *See LMA*, 335 F.3d at 725-26; *Cochran*, 359 F.3d at 279; *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *30 n.21.[10] The pork checkoff likewise is unconstitutional under *Central Hudson*.

a. The Governmental Interest Is Not Substantial.

Petitioners are wrong that "the welfare of pork producers" is a sufficiently important government interest to justify the compelled assessments. First, as the Third Circuit noted in *Cochran*, "promotional programs such as the Dairy Act seem to really be special interest legislation on behalf of the industry's interest more so than the government's." 359 F.3d at 279. The same is true of the parallel Pork Act.

Second, in addition to the pork checkoff, the government also has enacted similar generic promotion programs to promote products that compete with pork, such as beef.[11] That

---

[10] The Third Circuit's decision in *Cochran*, which was issued after petitioners filed their petitions for certiorari, refutes petitioners' argument that the Sixth Circuit's decision in this case is somehow inconsistent with the Third Circuit's decision in *Frame*. Prior to this Court's decisions in *Wileman Bros.* and *United Foods*, the Third Circuit had held in *Frame* that the beef checkoff was constitutional under *Central Hudson*. 885 F.2d at 1134. But in *Cochran*, the Third Circuit reconsidered its prior decision in light of this Court's intervening pronouncements. It discussed the different rationales courts have used to analyze commodity promotion programs, including the approach it used in *Frame*. The Third Circuit concluded that the different approaches made little difference since, in the end, *United Foods* governs. 359 F.3d at 279-80. The court in *Cochran* noted: "We reach this conclusion whether accepting the standard explicitly expressed in *Frame* or deciding that in view of the Court's discussion in *United Foods*, that standard is not [*sic*] longer controlling." *Id.* at 279 n.13.

[11] For instance, NPB, in its pork checkoff communications, identifies beef as being in competition with pork. C.A. App. 2254-86. At the same time, the Cattlemen's Beef Board, in its beef checkoff communications, maintains that beef has more of a potentially beneficial food compound

the beef and pork checkoffs are working at cross-purposes undermines any claim that the government has a "substantial interest" in promoting pork specifically. *See Livestock Marketing Ass'n v. United States Department of Agriculture*, 207 F. Supp. 2d 992, 1006 (N.D.S.D. 2002) ("After all, is the 'government message' therefore that consumers should eat no other product [other than beef] or at least reduce the consumption of other products such as pork, chicken, fish or soy meal?"); *see also Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187 (1999) (striking under *Central Hudson* a federal restriction on advertising related to casino gambling in part because Congress allowed other forms of gambling to flourish). By authorizing multiple, competing checkoffs, Congress is not promoting the welfare of pork producers; rather, it is promoting the interest of competing industry groups like private petitioners that receive funding from commodity checkoffs.

b. The Pork Checkoff Does Not Directly Advance Any Asserted Governmental Interest.

Even if the two other interests the United States identified as served by the Pork Act – namely, "stabilizing the general economy of the United States," or "ensuring that the people of the United States receive adequate nourishment" – can be considered substantial in some circumstances, the government does not meet its "burden of showing that the challenged regulation advances the Government's interest in a direct and material way. That burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

---

than pork and that beef tops pork in per capita consumption. *See id.* 2287-2300.

Rubin v. Coors Brewing Co., 514 U.S. 476, 486-87 (1995) (internal quotation marks omitted).

The record in this case contains no evidence suggesting that a pork nutrition problem exists in this country or that the Pork Act will help alleviate it. Nor does the record show that the Pork Act has a beneficial effect upon the American economy as a whole. Indeed, petitioners cannot even show that the Pork Act benefits the entire pork industry. Although the pork checkoff arguably has helped packers and retailers, petitioners cannot plausibly argue that promotion of specific multinational retailers and processors through checkoff-funded "branded advertising" directly advances the interests of pork producers. USDA statistics show that hog farmers' share of the retail pork dollar declined from 42.5% to 30.1% between 1996 and 2001. U.S. Pet. App. 19a. Thus, the true "free riders" of the pork checkoff are retailers and processors. What is more, since the Pork Act's inception, at least 415,000 hog farmers have quit raising hogs. C.A. App. 1194, 1217. The producers themselves are in the best position to judge whether the pork checkoff has directly advanced their interests. They answered that question with a resounding "no" when 53% of them voted to terminate the entire program. U.S. Pet. App. 17a.

c. The Pork Checkoff Is Far More Extensive Than Necessary to Serve Any Asserted Governmental Interest.

The pork checkoff also burdens First Amendment speech more than necessary to advance the purported governmental interest. If the government's interest in the welfare of the pork industry were truly substantial, the government could use funds from general revenues to fund the same projects. *See Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *30 n.21. Indeed, it has done so in the past. For example, the Small Hog Operation Payment program provided government payments to small- and medium-sized producers based on past production in response to historically low hog prices in 1998

and 1999. *See* 7 C.F.R. § 759.1 (2003). That government-funded program actually did enhance the welfare of pork producers. Here, however, the government has chosen to address these alleged problems by compelling respondents to fund speech with which they disagree. Accordingly, the Pork Act fails even the more lenient *Central Hudson* test.

C. The Injunction Ordered by the District Court and Affirmed by the Sixth Circuit Is the Only Feasible Remedy.

There is no reason for this Court to grant certiorari on the issue of the scope of the injunction ordered by the courts below. The injunction is well supported by the courts' decisions and is the only practicable remedy in this case. The district court's exercise of its traditional authority to grant equitable relief, and the Sixth Circuit's finding that the district court did not abuse its discretion, present no significant issues warranting this Court's review.

The Sixth Circuit held: "Because the Pork Act is nearly identical in purpose, structure, and implementation to the Mushroom Act, the Pork Act is unconstitutional under the analysis set forth in *United Foods*." U.S. Pet. App. 10a. The Sixth Circuit thus held that the entire Pork Act was unconstitutional. Its decision was not "confined to the government's requiring respondents (or their members) to share the costs of the generic advertising and similar promotional activities under the Pork Act," as the United States asserts. U.S. Pet. 22. The Sixth Circuit correctly upheld the injunction's nationwide application, and explicitly and correctly ruled that its decision could not be limited solely to checkoff advertising activities. U.S. Pet. App. 12a-14a.

1. The Injunction Cannot Be Limited to Respondents.

While the general rule is that an injunction should be "no more burdensome than necessary to the defendant to provide complete relief to the plaintiffs," there are no legal limits on

the scope of a federal court's injunction. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). This Court in *Yamasaki* upheld a nationwide injunction. *Id.* at 705.

In this case, the injunction could not be limited to respondents. If the Pork Act is unconstitutional for one, it is unconstitutional for all. This Court in *United Foods* ruled the Mushroom Act unconstitutional based solely on the objections of a single producer. 533 U.S. at 408-09. When a regulation or law is found to be invalid, courts must enjoin any further application of that regulation or law. *See, e.g., Dimension Financial Corp. v. Board of Governors of the Fed. Res. Sys.*, 744 F.2d 1402, 1411 (10th Cir. 1984) (enjoining the Board from enforcing or implementing invalid regulations); *Decker v. O'Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (rejecting the Department of Labor's argument that nationwide injunction was overly broad and should be limited only to parties where the program was declared unconstitutional); *American Mining Cong. v. U.S. Army Corps of Engineers*, 962 F. Supp. 2, 4-5 (D.D.C. 1997) (rejecting the government's contention that an injunction should be limited to members of plaintiff associations; enjoining application of invalid rule).

As the district court held, it could not limit its injunction only to the parties without rewriting the statute, which it cannot do. *See* U.S. Pet. App. 52a; *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements."); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("[I]t is for Congress, not this Court, to rewrite the statute."). The Pork Act does not provide for voluntary assessments or exclusions. Therefore, if the Pork Act violates respondents' First Amendment rights, the only appropriate relief is to strike down the entire Act.

Moreover, a more limited injunction would have been infeasible. Checkoff payments are remitted primarily through third parties who buy hogs from farmers. 7 C.F.R. § 1230.71.

It would not be possible to limit the injunction to only those packers who have dealings with respondents, or to their dealings with respondents only. *Cf. Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (injunction ordering the Secretary of Labor to enforce the Migrant and Seasonal Agricultural Worker Protection Act could not be enforced only against contractors who had dealings with the named plaintiffs, or only as to their dealings with the named plaintiffs).[12]

2. The Injunction Cannot Be Limited to Promotional or Advertising Activities.

When legislation does not contain a severability clause, as the Pork Act does not, a reviewing court "must invalidate the entire statute if the 'balance of the legislation is incapable of functioning independently.'" U.S. Pet. App. 12a-13a (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)). In this case, the Sixth Circuit correctly concluded: "The very basis for holding that the Act violates the First Amendment – that its assessment of fees to promote pork is the chief goal of the Act, which does not create a broader regulatory program – prevents us from preserving other parts of the statute." U.S. Pet. App. 13a.

Petitioners have presented no persuasive reason for this Court to disturb or question that conclusion. The stated purpose of the Pork Act is to promote pork. 7 U.S.C. § 4801(b)(1). Even the definitions of "research" and "consumer information" in the Pork Act demonstrate that

---

[12] Limiting an injunction to the hog farmer members of respondent CFF and its member organizations would require them to identify themselves, their associational affiliations, and their political beliefs to USDA, private petitioners, and packers. An injunction so structured would have an obvious chilling effect on the exercise of the very First Amendment rights those individuals are trying to vindicate through this lawsuit. *Cf. CFF v. Glickman*, 200 F.3d at 1188-89 (holding farmers' positions on the "controversial issue" of a mandatory checkoff were entitled to privacy protection).

those aspects of the program are also intended to further the promotion of pork. 7 U.S.C. §§ 4802(2), (13).

In any event, the vast majority of checkoff funds continue to be expended on outright promotion. Of the eighty-one percent of the funds that were expended on national programs in 2002 (nineteen percent went to the states for them to spend as they wish for promotion, consumer information, or research), seventy-one percent were spent on promotion activities. National Pork Board, *Pork Checkoff Report*, Vol. 22 No. 1, at 28 (Winter 2003), *available at* http://www.porkboard.org/docs/porkcheckoffQtr12003.pdf. The 2003 Pork Checkoff Report shows that only eight cents of every checkoff dollar was actually spent on "Science & Technology," and makes clear that the purpose of the "research" and "consumer information" components is to further promote pork. *Id.*

Virtually everything funded by the checkoff is speech. That promotion and consumer information constitute speech cannot be questioned. And the research component of the budget, eight percent in 2002, also constitutes speech, since the purpose of doing the research is to publish the results on NPB's website, at www.porkboard.org. *See id.* at 9. As set forth above, respondents have ideological objections to that speech. *See supra* at 6-8, 20.

The entire motivation for the checkoff was the promotion of pork. Enjoining the most fundamental portion of the Pork Act – the promotion portion – while leaving in place the peripheral aspects would fashion a very different program than the one Congress created.[13] The district court had ample

---

[13] Petitioners' assertion that *Abood* and *Keller* stand for the proposition that the appropriate remedy for an individual who objects to funding political speech to which he objects is to reduce that individual's assessment misses the crucial underlying point that in *Abood* and *Keller*, *some* of the assessments were found to be germane to a greater statutory scheme or purpose. This Court in *United Foods* ruled that assessments for the promotion of a commodity were germane only to themselves, and thus

basis for exercising its equitable powers in crafting the remedy, as did the Sixth Circuit for affirming the district court. Their decisions raise no questions of exceptional importance warranting this Court's review.

II. This Court Should Deny Certiorari in Both the Present Case and in *Veneman v. LMA*, But If It Grants Certiorari in Either Case, It Should Grant It in Both.

The issues in this litigation have already been fully decided by *United Foods* and by the four recent court of appeals decisions that address and reject petitioners' arguments. But if there is to be further review by this Court, it should be done in a comprehensive way so that USDA can no longer force family farmers to bear the additional costs and burdens of organizing costly legal challenges on a commodity-by-commodity basis. If this Court determines that it is appropriate to grant certiorari in *LMA* or in this case, it should grant certiorari in both cases and set them for oral argument together.

In its briefing of *United Foods*, the United States identified a number of agricultural checkoff programs which it described as virtually identical to the mushroom checkoff, and therefore indicative of the great precedential significance of that case. Since this Court decided *United Foods*, USDA has not applied that precedent to other agricultural checkoff programs, but has instead launched a scorched earth, government speech defense for all of them, even those that it identified as virtually identical to the mushroom checkoff.[14]

---

they were unconstitutional. 533 U.S. at 415-16. Without the critical finding of some substantial government interest justifying the compelled association for expressive purposes in the first place, there is nothing for the assessments to be germane to, and therefore nothing to justify any compelled contributions in the first place.

[14] Indeed, since initially lowering the rate of assessment on mushroom growers after this Court's *United Foods* decision, the mushroom board

Hearing these two cases, with their factual variations, would provide the Court with ample evidence on which to make a decision on government speech that would apply to the range of mandatory checkoff programs. There are potentially several permutations of the government speech defense. For example, since mid-2001, the pork checkoff has been administered by NPB, the entity Congress designated to run it, while the National Beef Board has hired the National Cattlemen's Beef Association, a private commodity group not mentioned in the Beef Act, to act as the general contractor for the beef checkoff. *LMA*, 207 F. Supp. 2d at 995. In addition, the record in this case on the issue of whether the government's approval of the speech is "*pro forma*" is extensive and includes, among other things, copies of ads themselves and the corresponding approval documentation. Based on that record, the district court recognized that review by the Agriculture Marketing Services results in edits to only four percent of all ads funded by the pork checkoff. U.S. Pet. App. 42a.

Similarly, with regard to petitioners' challenge to the lower courts' remedy, hearing both cases would provide the Court with a basis for rendering a decision that would apply across the spectrum of mandatory checkoff programs. For example, the Beef Act has a unique legislative history, on which the Eighth Circuit based its conclusion that the non-promotional aspects of the Beef Act are not severable from the promotional aspects and thus the entire program should be enjoined. This case, on the other hand, has a complete record

---

increased the assessment to a rate higher than it was before this Court's decision. Agricultural Marketing Services (AMS) News Release, *USDA Approves Mushroom Program Assessment Reduction*, No. 176-01 (Aug. 3, 2001), *at* http://www.ams.usda.gov/news/176-01.htm; *USDA Approves Mushroom Program Assessment Increase*, No. 291-01 (Dec. 4, 2001), *at* http://www.ams.usda.gov/news/291-01.htm; *USDA Approves Mushroom Program Assessment Increase*, No. 281-02 (Nov. 6, 2002), *at* http://www.ams.usda.gov/news/281-02.htm.

of the details of the programs funded by the pork checkoff, demonstrating why the different portions of the Pork Act are not severable and why everything funded by the pork checkoff is objectionable speech. Hearing both cases would allow the Court to render a ruling that would have broad applicability to all mandatory checkoff programs.

Hearing two cases from two different agricultural industries would also provide the Court with the broader backdrop necessary to finally resolve the legal issues raised by petitioners' argument that the case should be governed by the standard set forth in *Central Hudson*. For example, the government advances competing interests to justify the infringement on producers' First Amendment rights in the beef checkoff and the pork checkoff under *Central Hudson*. If the Court were to address the level of constitutional inquiry to be applied to checkoff programs, it should have before it the different interests the government claims are advanced.

This case contains a complete record of the programs funded by the pork checkoff and the objections to each of those programs, showing that the speech is not commercial, but ideological and political. Respondents' objections to the pork checkoff and the programs it funds go to the very core of their values, engendering the "crisis of conscience" discussed by this Court in *Wileman Bros.* 521 U.S. at 472. The record in this case shows that the speech in this case is not just about advertising a product, or promoting a particular brand as opposed to the generic product. The programs and resulting speech generated by the pork checkoff support a system of agriculture that is anathema to those compelled to pay for them. Farming has never been just about commerce; it is a way of life. The polarization of views about the future of agriculture in this country is dramatically illustrated in the hog industry. Respondents believe that farming involves stewardship of the land and fostering healthy and vibrant rural communities.

The United States's request to hold this case – with its clear record on the ideological and political nature of the speech and objections – is another example of the government's litigation tactics of raising and then dropping arguments in order to delay the day when the last checkoff dollar is collected.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Thomas C. Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Susan E. Stokes
Counsel of Record
David R. Moeller
Karen R. Krub
FARMERS' LEGAL ACTION GROUP, INC.
46 E. 4th Street, Suite 1301
St. Paul, MN 55101
(651) 223-5400

April 19, 2004[15]

---

[15] Counsel for respondents were principally assisted by Farmers' Legal Action Group Staff Attorney Jess Anna Speier, and the following students in the Stanford Law School Supreme Court Litigation Clinic, supervised by Thomas C. Goldstein and Pamela S. Karlan: Michael P. Abate, Eric J. Feigin, and Daniel S. Goldman. Clinic members William B. Adams, David M. Cooper, Nicola J. Mrazek, and Jennifer J. Thomas also contributed.